

Exhibit B

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 CASE NO. 18-23538-rdd (Chapter 11)

4 - - - - - x

5 In re:

6

7 SEARS HOLDINGS CORPORATION, et al.

8

9 Debtors.

10 - - - - - x

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13 U.S. Bankruptcy Court
14 300 Quarropas Street
15 White Plains, New York 10601

16

17 May 21, 2019

18 10:27 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

1 Notice of Agenda of Matters Scheduled for Hearing on May 21,
2 2019 at 10:00 a.m.

3
4 Application of Fee Examiner, Pursuant to Section 327(a) of
5 the Bankruptcy Code, Bankruptcy Rule 2014, and Local
6 Bankruptcy Rules 2014-1 and 2016-1, for the Entry of an
7 Order Authorizing the Retention and Employment of Ballard
8 Spahr LLP as Counsel to the Fee Examiner, Nunc Pro Tunc to
9 the Appointment Date filed by Paul E. Hamer on behalf of Fee
10 Examiner (document #3682)

11
12 Motion of Debtors for Order Shortening Notice with Respect
13 to Debtors' Motion for Authorization and Approval of (I)
14 Settlement between Debtors and The Chubb Companies, (II)
15 Debtors' Entry into the Transaction Documents, and (III)
16 Related Relief (document #3615)

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18 Debtors' Motion for Authorization and Approval of (I)
19 Settlement between Debtors and The Chubb Companies, (II)
20 Debtors' Entry into the Transaction Documents, and (III)
21 Related Relief (document #3614)

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1 Notice of Presentment of Debtors Motion for Authority to
2 Assume Unexpired Leases of Nonresidential Real Property
3 (document #3376) Objection of 7200 Arlington Associates LLC
4 (document #3595)
5
6 Debtors Motion for Authority to Assume Unexpired Leases of
7 Nonresidential Real Property (related document(s) 3376)
8
9 Objection of 7200 Arlington Associates LLC (document #3595)
10
11 Notice of Presentment of Order (I) Authorizing Assumption
12 and Assignment of Lease of Non-Residential Real Property and
13 (II) Granting Related Relief, with Exhibit A (related
14 document(s) 3624, 3008, 3665, 3811)
15
16 Notice of Presentment of Stipulation among Buyer, Seller,
17 and Brookfield Property REIT Inc. filed by Ryan Zachary
18 Gelber on behalf of Transform Holdco LLC. (document #3913)
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1 Motion of FTI Consulting Canada Inc., for Relief From the
2 Automatic Stay for the Purpose of Joining Sears Holdings
3 Corporation as a Defendant in Existing Litigation Pending
4 Before the Ontario Superior Court of Justice (Commercial
5 List) and to Liquidate Certain Claims Against Sears Holdings
6 Corporation in Such Existing Litigation filed by Eric C.
7 Daucher on behalf of FTI Consulting Canada Inc. (document
8 #3237)

9
10 Motion of Liberty Insurance Corporation of Relief from the
11 Automatic Stay (document #3294)

12
13 Motion of Rosa Melgar for Relief from the Automatic Stay
14 (document #2960)

15
16 Motion of Apex Tool Group, LLC to Allow and Compel Immediate
17 Payment of Administrative Expense Claim Pursuant to 11
18 U.S.C. 503(b)(1)(a) and 11 U.S.C. 503(b)(9) filed by Gregg
19 M. Galardi on behalf of Apex Tool Group, LLC (document
20 #1491)

21
22 Debtors' Omnibus Objection (document #3883)

23

24

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1 Motion of Milton Manufacturing, LLC to Allow and Compel
2 Payment of Administrative Expense Claim Under 11 U.S.C.
3 §503(b) For Craftsman Branded Goods Delivered to the Debtor
4 Postpetition filed by Joel D. Applebaum on behalf of Milton
5 Manufacturing, LLC (document #1477)
6
7 Motion to Allow and Compel Payment of Administrative Expense
8 Claim Under 11 U.C. Sec. 503(b) for Jaclyn Smith Branded and
9 Private Label Goods Delivered to the Debtor Post-Petition
10 (ECF #3323)
11
12 Debtors' Omnibus Objection (document #3883)
13
14 Motion of Gokaldas Exports Ltd. to Allow and Compel Payment
15 of Administrative Expense Claims (document #3670)
16
17 Motion by Pearl Global Industries Ltd. to Allow and Compel
18 Payment of Administrative Expense Claim (document #3604)
19
20 Notice of Assumption and Assignment of Additional
21 Designatable Leases (related document(s) 3008, 1731, 3097,
22 2753, 2314, 2995, 3152, 1774) filed by Luke A Barefoot on
23 behalf of Transform Holdco LLC. (document #3298)
24
25 Transcribed by: Sherri L. Breach, Cert*D-397

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1 P R O C E E D I N G S

2 THE COURT: I just want to make sure, is the
3 microphone on? Is the green light on?

4 MS. MARCUS: I think it -- the green light is
5 green.

6 THE COURT: Yes. Okay. All right.

7 MS. MARCUS: The first item on the agenda this
8 morning is an uncontested matter. It's the application of
9 the fee examiner for the entry of an order authorizing the
10 retention and employment of Ballard Spahr.

11 A certificate of no objection was filed by Ballard
12 Spahr and I understand that the order was submitted to the
13 Court on Thursday. We left it on the agenda, Your Honor,
14 because it hadn't been signed yet. I know --

15 THE COURT: Okay.

16 MS. MARCUS: -- you had a busy weekend, so --

17 THE COURT: I think I may have set it in
18 yesterday. In any event I'll grant it with the admonition
19 or hope that most of the work here will be done by the fee
20 examiner himself and that the law firm will be assisting him
21 only on matters such as will be appropriate under the
22 circumstances. I think Mr. Harner is quite an experienced
23 lawyer and can do most of this work himself.

24 MS. MARCUS: Your Honor, Ms. Roglen is here on
25 behalf of Ballard Spahr. I don't know if she --

1 THE COURT: No. I don't --

2 MS. MARCUS: -- wants to add anything.

3 THE COURT: I don't need anything else other --

4 MS. MARCUS: Okay.

5 THE COURT: -- than that. So that order will get
6 entered shortly.

7 MS. MARCUS: Okay. Thank you, Your Honor.

8 Items 2 and 3 on the agenda, Your Honor, should be
9 taken together. Item 3, going a little bit out of order, is
10 the debtors' motion for authorization and approval of a
11 settlement between the debtors and the Chubb Companies, and
12 the debtors' entry into certain transaction documents
13 related to that.

14 The Item Number 2 on the agenda is the most to
15 shorten time related to that motion.

16 THE COURT: Right.

17 MS. MARCUS: We haven't had any objections to
18 either the substantive motion or the request for the order
19 shortening time.

20 THE COURT: Okay. I will grant the motion to
21 shorten. As most of you know my practice is not to grant
22 these ex parte unless I absolutely have to do, and to do
23 something in between which is -- if I think there's a
24 potential basis to shorten I'll schedule the hearing on the
25 motion to shorten with the same time as the underlying

1 relief, giving people a chance to say this should be heard
2 on longer notice.

3 But that wasn't the case here. So I'll grant that
4 motion.

5 I've reviewed the underlying motion as well. I
6 guess the only issue is the dollar amount, everyone is
7 agreed that's the potential exposure? There's no more risk
8 for the debtor in any event?

9 MS. MARCUS: That's correct, Your Honor. The --

10 THE COURT: And --

11 MS. MARCUS: The arrangements basically replace
12 the insurance that the debtors had through Sears and through
13 a Chubb affiliate --

14 THE COURT: Right.

15 MS. MARCUS: -- with a new direct policy. So the
16 total amount of coverage is the same and there's no cost to
17 the debtors. It just stayed the same.

18 THE COURT: Right. It's just a pass through
19 transaction.

20 MS. MARCUS: That's correct.

21 THE COURT: So I will grant that motion. You can
22 email both of those orders to chambers.

23 MS. MARCUS: Thank you, Your Honor.

24 Item 4 on the agenda, Your Honor, is the debtors'
25 motion which was originally framed as a motion for authority

1 to assume unexpired leases of non-residential real property,
2 ECF Number 3376. It pertains to three leases relating to
3 property located in Riverside, California.

4 These leases were not sold to transform pursuant
5 to the asset purchase agreement. At the time we filed the
6 motion we were cognizant of the impending 365(d)(4) deadline
7 and we didn't have a proposed transaction in hand that was
8 signed and ready to be filed with the Court.

9 You might recall, Your Honor, that at the hearing
10 on May 8th I mentioned that we might be amending the relief
11 sought in that motion.

12 After we filed the motion we were able to enter
13 into an agreement for the assignment of the lease with
14 Brixton Capital. When the landlord for the property, which
15 had objected to the assumption motion, learned of the
16 proposed transaction it indicated that it was prepared to
17 outbid Brixton.

18 Last Thursday, May 16th, we had what I'll call a
19 mini-auction for the property, and after two rounds of
20 bidding the landlord emerged as the successful bidder.

21 As a result on Friday we filed a notice of hearing
22 together with a supplement to the motion changing the relief
23 requested to approval of the assumption and assignment of
24 the leases to the landlord's designee, and we also filed a
25 revised proposed order that provides the requested relief.

1 I might add, Your Honor, that the professionals
2 for the creditors' committee were kept in the loop as this
3 process unfolded. And I think they were supportive of the
4 debtors' approach.

5 THE COURT: Okay.

6 MS. MARCUS: As reflected in the supplement the
7 landlord has agreed to pay the debtors' \$1,265,000 for the
8 leases and to waive any cure payments or adequate assurance
9 of future performance.

10 In addition to seeking the authorization to assume
11 and assign the leases, the debtors are seeking authorization
12 to pay Brixton Capital \$30,000 in legal fees. The debtors
13 had agreed to seek such authorization in order to persuade
14 Brixton to participate in the auction.

15 Brixton's interest in the property and its
16 participation in the auction clearly enhanced the value
17 provided to the debtors' estates. Consequently, we believe
18 that payment of the fee is appropriate under Section 363 of
19 the Bankruptcy Code.

20 THE COURT: Right. And Brixton's bid was -- it
21 went up to a 1,130,000 and that enabled the auction to
22 happen.

23 MS. MARCUS: That's correct, Your Honor.

24 THE COURT: Okay. Does anyone have anything to
25 say on this motion?

1 All right. I will grant the modified relief
2 requested by the debtors approving the -- in essence the
3 sale of the lease to the landlord on the terms outlined and
4 the payment of the \$30,000 to the -- to Brixton --

5 MS. MARCUS: Thank you, Your Honor.

6 THE COURT: -- that facilitated the auction.

7 MS. MARCUS: Thank you.

8 Item Number 5 on the agenda will actually be
9 handled by Mr. Barefoot on behalf of Cleary.

10 THE COURT: Okay.

11 MR. BAREFOOT: Good morning, Your Honor. Luke
12 Barefoot from Cleary Gottlieb Steed & Hamilton for Transform
13 Holdco and its affiliates.

14 THE COURT: Right.

15 MR. BAREFOOT: Your Honor, on Agenda Item Number
16 5, this concerns Store Number 26741 in Amherst, New York.
17 Your Honor may remember at the conclusion of the assumption
18 and assignment hearing on May 8th there was a brief
19 discussion about this property. We had filed a -- what was
20 then a pending stipulation to extend the time under Section
21 365(d)(4). The designee, Transform's designee needed to
22 take assignment of the lease objected to that extension. It
23 was entered into with the current landlord.

24 I'm pleased to report that that objection was
25 subsequently resolved by a revised stipulation that provided

1 for shorten time for the landlord to file its cure cost
2 objections. Those cure costs have now been agreed to
3 between the designee and Transform. And we submitted a
4 revised form of order that's substantially in the form that
5 Your Honor entered on May 8th, but that is tweaked to
6 address the specific circumstances of this lease.

7 That proposed order was submitted on notice of
8 presentment at Docket Item 3939. Like some of our other
9 notices of presentment this was noticed for hearing today,
10 not in compliance with the time requirements that would
11 otherwise apply under the case management order.

12 THE COURT: All right. Let me just make -- what
13 is left then with regard to this lease? Any -- are there
14 any -- there -- what open disputes, if any, are remaining?

15 MR. BAREFOOT: There are none, Your Honor.

16 THE COURT: There are none.

17 MR. BAREFOOT: This is an entirely consensual one.

18 THE COURT: So the landlord's -- put it
19 differently, the stipulation I thought provided deadlines
20 for certain things to happen and the hearing to happen in
21 case there were objections. But, in fact, there are no
22 objections?

23 MR. BAREFOOT: There was an objection from the
24 landlord that asserted approximately \$9,000 in cure costs.
25 Transform has agreed to pay those cure costs --

1 THE COURT: Okay.

2 MR. BAREFOOT: -- as part of the transaction with
3 the designee.

4 THE COURT: All right. Very well.

5 I just want to make sure, does anyone want to be
6 heard on this motion?

7 All right. I'll grant the relief as modified
8 including the shortened notice given the context here. So
9 you can submit that order to chambers.

10 MR. BAREFOOT: Thank you, Your Honor.

11 THE COURT: Okay.

12 MR. BAREFOOT: With Your Honor's permission I
13 would like to take something that was on the contested
14 portion of the calendar out of order.

15 Item Number 17 on the contested portion, it
16 concerns Store Number 7471 in Placerville, California. I'm
17 pleased to report that this is now an entirely consensual
18 assumption and assignment.

19 Your Honor, there was a stipulation entered by the
20 Court on May 13th at Docket Item 3852 that provided for an
21 extension of time to assume or reject and to address the
22 landlord's objections on a number of grounds, including cure
23 and adequate assurance.

24 That stipulation set the hearing on the assumption
25 and assignment of the Placerville lease for today. I'm

1 pleased to report that we have agreed on a form of order
2 that again substantively mirrors in all respects Your
3 Honor's order entered on May 13th with respect to the bulk
4 of the leases.

5 That was set down for hearing today, so it has not
6 been filed on notice of presentment, but it has been agreed
7 to by the landlord, the debtors and Transform. And with
8 Your Honor's permission following the hearing we would
9 propose to submit it to chambers.

10 THE COURT: Okay. And that, again, is the matter
11 that appears on 17 on the agenda?

12 MR. BAREFOOT: That's correct, Your Honor.

13 THE COURT: The cure objection --

14 MR. BAREFOOT: I would just like to --

15 THE COURT: -- cure objection of Alan Robbins?

16 MR. BAREFOOT: Correct, with respect to the --

17 THE COURT: And so that's --

18 MR. BAREFOOT: -- Placerville, California --

19 THE COURT: All right. So that's been resolved.

20 All right. Very well. So I'll look for that once
21 the notice period passes.

22 MR. BAREFOOT: Thank you, Your Honor.

23 I would propose to turn the podium over to my
24 colleague, Zack Gelber, who will address Item Number 6.

25 THE COURT: Okay.

1 MR. GELBER: Good morning, Your Honor. Zack
2 Gelber on --

3 THE COURT: Good morning.

4 MR. GELBER: -- behalf of Transform Co from Gelber
5 & Santillo as conflicts counsel.

6 We are here on a notice of presentment of a
7 stipulation between the debtor and Transform as buyer and
8 Brookfield REIT.

9 THE COURT: Right.

10 MR. GELBER: The parties have agreed consensually
11 and there have been no objections to two main points. One
12 is to extend the hearing date from today, May 21st to May
13 29th with respect to any disputes. And the second is that
14 Exhibit A to the May 13th order had erroneously designated
15 eight leases for assignment and assumption that the parties
16 all agree were designated erroneously. We would like to
17 remove those consensually and set them down with the other
18 leases between Brookfield and the debtor for May 30 -- for
19 the May 31st deadline for the debtor to determine whether to
20 assume those leases.

21 THE COURT: Okay. Very well.

22 MR. GELBER: I would note, Your Honor, this is
23 also on a less than the eight days required under the case
24 management order.

25 THE COURT: Right, but essentially it's an

1 adjournment and --

2 MR. GELBER: Yes.

3 THE COURT: -- you can email that order to
4 chambers. I'll grant it.

5 MR. GELBER: Thank you, Your Honor.

6 THE COURT: Okay.

7 MS. MARCUS: That brings us, Your Honor, to the
8 contested matters for today's hearing, and the first one is
9 the motion of FTI Consulting Canada.

10 THE COURT: Can I -- I understood that the next
11 one that's Number 8 on the agenda was actually adjourned,
12 motion of William Juiris; is that --

13 MS. MARCUS: That's correct --

14 THE COURT: -- right?

15 MS. MARCUS: -- Your Honor.

16 THE COURT: All right. So --

17 MS. MARCUS: That happened late yesterday.

18 THE COURT: Okay. So then we should -- I just
19 want to make sure there's no one on the phone or no one here
20 on that matter.

21 Then let's go back to the FTI Consulting lift stay
22 motion.

23 MR. DAUCHER: Good morning, Your Honor. Eric
24 Daucher from Norton Rose Fulbright on behalf of FTI
25 Consulting Canada Inc. --

1 THE COURT: Good morning.

2 MR. DAUCHER: -- in its capacity as court-
3 appointed monitor for Sears Canada Inc. and a number of its
4 affiliates in proceedings under Canada's company's creditors
5 arrangement which is currently pending before the Ontario
6 Superior Court of Justice Commercial List.

7 With me in the courtroom today are U.S. Counsel
8 for the monitors co-movants. We have Neil Oxford of Hughes,
9 Hubbard & Reed who is here on behalf of the litigation
10 trustee and also the class action representatives. And we
11 have Laura Hall of Allen & Overy who is here on behalf of
12 the Pension Plan Administrator.

13 THE COURT: Okay.

14 MR. DAUCHER: We are before Your Honor today of
15 course on the Canadian plaintiffs', as we are calling
16 ourselves, motion for relief from the automatic stay.

17 That motion is supported by a declaration from Mr.
18 Steven Bissell (ph) of FTI Consulting Canada, again, in its
19 capacity as monitor of Sears Canada. We would like to begin
20 by moving Mr. Bissell's declaration into evidence. Mr.
21 Bissell is in the courtroom here today and is available for
22 cross-examination as necessary.

23 THE COURT: Okay. Does anyone have any objection
24 to that?

25 MS. MARCUS: Your Honor, on behalf of the debtors

1 Jacqueline Marcus again. The debtors do take issue with
2 some of the statements in Mr. Bissell's declaration. But
3 given that those statements are immaterial to the resolution
4 of the motion today we will forego our opportunity to cross-
5 examine.

6 THE COURT: Okay. I think you had pointed out
7 some of those already. But in any event I'll -- I read the
8 declaration and I'll admit it.

9 MR. DAUCHER: And we have extra hard copies
10 available if Your Honor would like a hard copy, otherwise we
11 can just proceed.

12 THE COURT: That's okay.

13 MR. DAUCHER: Okay.

14 And, Your Honor, as we set out in the motion the
15 Canadian plaintiffs are in the midst of a litigation before
16 the Canadian Court related to what we've termed the 2013
17 dividend. And that was a transfer which was approved in
18 November 2013 of approximately \$509 million Canadian dollars
19 from Sears Canada to its shareholders, including Sears
20 Holdings.

21 And although the Canadian plaintiffs each have
22 distinct claims related to that transfer, because the
23 Canadian Court has recognized the importance of efficiency
24 here, all of the claims are being jointly case managed
25 together. That's currently set for a trial scheduled to

1 kick off beginning on February 3rd of 2020.

2 Now the missing piece of that litigation, the one
3 thing that really prevents all of the Canadian plaintiffs'
4 claims from being definitively resolved in a single
5 proceeding in a single forum is the absence of Sears
6 Holdings as a defendant.

7 And the reason for that absence is the potential
8 application of the automatic stay which the Canadian
9 plaintiffs have been careful to respect.

10 THE COURT: Can I interrupt you on that?

11 MR. DAUCHER: Of course.

12 THE COURT: It's clear to me that a fair amount
13 has already happened in these three actions. In fact, one
14 of them has been pending for some -- well, for four years.
15 There's a discovery schedule with document production to be
16 complete by June 30th. Depositions scheduled tentatively
17 for September 2019, and as you said a joint trial for
18 February.

19 That suggests to me perhaps that while taking
20 discovery from Sears Holdings may be important, the parties
21 -- it didn't jump out at the parties that having Sears
22 Holdings as a live defendant was important because it seems
23 like they proceeded without them for a while at least.

24 MR. DAUCHER: On that, Your Honor, and I -- my
25 colleague will ultimately speak a little further on the

1 current status of the Canadian litigation. But I can say a
2 few things, which is Sears Holdings wasn't initially named
3 as a defendant in three of the actions --

4 THE COURT: Right.

5 MR. DAUCHER: -- specifically because of the
6 automatic stay. In the fourth action, the one that has been
7 pending for a great deal of time, Sears Holdings was named
8 as a defendant and that was only voluntarily stayed as
9 against Sears Holdings.

10 In addition, Sears Holdings has been participating
11 in those proceedings, I won't say quite from the beginning,
12 but from the early stages. They've been on the service
13 list. Their lawyers have appeared. In fact --

14 THE COURT: But not since the start of the
15 bankruptcy -- of this Chapter 11 case?

16 MR. DAUCHER: Oh, no. Even since the start of
17 these Chapter 11 cases.

18 THE COURT: Okay.

19 MR. DAUCHER: In fact, if you look at Exhibit D to
20 our reply brief you'll see an order issued by Justice
21 McCughen (ph) holding in abeyance additional progress in the
22 litigation upon the motion of Sears Holdings pending
23 disposition of this motion.

24 So the parties were aware. Sears Holdings was
25 certainly aware that it could ultimately end up in this

1 litigation. The Canadian Court has taken steps to ensure
2 this is written down in black and white that Sears Holdings
3 is not prejudiced by the current advancement of the
4 litigation and that it's just being held up until this
5 motion is resolved.

6 THE COURT: Okay.

7 MR. DAUCHER: Frankly, Your Honor, we initially
8 hoped that this motion wouldn't be necessary. We thought
9 that what we were proposing, that Canadian plaintiffs'
10 claims can be resolved in one trial, one proceeding, one
11 court. It made so much sense that we could do this on
12 consent. Unfortunately, after a couple of weeks of
13 consideration -- and we did give the debtors and the
14 committee weeks to consider this -- they turned us down.

15 So let's talk a little bit about why we believe
16 this makes so much sense.

17 First, we think that one litigation is better than
18 two. Why would we want to expend limited estate resources,
19 not just of one estate, we have insolvent estates on both
20 sides of the border pursuing two litigations when you could
21 have one? Why would we want to take up court time of two
22 busy courts rather than one running through two proceedings?
23 And why would we want to create a risk of inconsistent
24 judgments on the very same questions of fact and the very
25 same questions of law by heading into two proceedings? We

1 don't.

2 Second, we think it makes sense to defer to the
3 Court with the greater expertise in the particular claims at
4 issue in the Canadian litigation. And we're already before
5 a specialized Canadian Court with enormous expertise in the
6 particular types of Canadian law causes of action that the
7 Canadian plaintiffs are pursuing.

8 Why would we put this Court in the position of
9 having to second guess the decisions of a Canadian Court?
10 Why would we put the parties in the position of potentially
11 having the decisions of the Canadian Court second guessed on
12 issues of Canadian law? Again, we wouldn't.

13 Given that posture, we think that the SONOX
14 factors overwhelmingly favor relief from the automatic stay.
15 I know Your Honor is familiar with those factors and I'm not
16 going to rehash them. We've set out in -- at length both in
17 our motion papers and our reply why we believe the factors
18 overwhelmingly favor granting relief from the stay for the
19 limited purposes that we've requested.

20 THE COURT: Which is to liquidate the claim?

21 MR. DAUCHER: Which is purely to liquidate the
22 claim.

23 THE COURT: And as I understand it at this point
24 the claim is -- you've -- not all the plaintiffs, but a
25 claim has been filed in this case based on the facts or some

1 of the facts that are asserted in the pending actions. But
2 it's a general unsecured claim. It's not for a specific
3 property, right?

4 MR. DAUCHER: That's correct, Your Honor.

5 THE COURT: Okay.

6 MR. DAUCHER: And I will say I believe each of the
7 four plaintiffs have, in fact, submitted claims in these
8 cases.

9 The debtors and the committee apparently disagree
10 with our plan. They don't seem to think that one litigation
11 is preferable for -- to two. And yet when we read their
12 objection and then we -- when we read the committee's
13 joinder what we were really struck by is the number of our
14 core assertions that went entirely unanswered.

15 So, for example, with one narrow exception related
16 to a punitive damages claim the debtors and the committee
17 don't actually dispute that granting relief from the stay
18 would allow all of the Canadian plaintiffs' claims to be
19 resolved as against all parties. That's factor one.

20 Now we concede that the debtors have raised a good
21 point on the punitive damages claim and it's for that reason
22 and to ensure that the Canadian Court can, in fact, resolve
23 the issue as against all of the parties fully without
24 further action before this Court that the Canadian
25 plaintiffs are willing to waive their punitive and exemplary

1 damages claims as against Sears Holdings.

2 So with that I think the debtors' concerns on that
3 front are fully resolved.

4 Next, there's no suggestion that lifting the
5 automatic stay will delay distribution in these cases. To
6 the contrary, waiting to resolve the Canadian plaintiffs'
7 claims until after the adversary proceeding is resolved,
8 that's a recipe for delaying creditor --

9 THE COURT: Well --

10 MR. DAUCHER: -- distributions

11 THE COURT: -- when you say the adversary
12 proceeding you mean the ones that started here?

13 MR. DAUCHER: Correct. The adversary proceeding
14 as the debtors have defined in their objection.

15 THE COURT: Okay.

16 MR. DAUCHER: And that -- waiting until that is
17 resolved seems to be what they're driving at as they say
18 repeatedly, well, we need to determine what creditor
19 recoveries are before we can move forward (indiscernible).
20 Then we've got a very long sequence of events and it's going
21 to be an awfully long time before our claims are liquidated.
22 All the while we have a Canadian insolvency estate that has
23 completed virtually every task. Resolving this asset is one
24 of the few remaining tasks that needs to be done in Canada
25 and it's just not right to hold that open for potentially

1 years on end when the issue could be resolved in a timely
2 manner.

3 THE COURT: Can I -- I just want to make sure, the
4 claims against Sears Holdings is -- I'm going to use
5 shorthand. It's essentially a fraudulent transfer claim,
6 right? I mean, that's not the term under Canadian law, but
7 it's essentially a fraudulent transfer claim?

8 MR. DAUCHER: The monitor's claim I would say is
9 most similar to what we would call a constructive fraudulent
10 transfer claim. That's --

11 THE COURT: Right.

12 MR. DAUCHER: That's correct. There are
13 differences between Canadian law and U.S. law on that front
14 obviously. But the monitor's claim at least is most like a
15 constructive fraudulent transfer claim.

16 The pension party's claims are substantially
17 different. There you're talking about complex and evolving
18 breach of fiduciary duty claims. There is a relatively
19 recent case from the Canadian Supreme Court that apparently
20 really started the wheels turning in this area of Canadian
21 law. So I won't venture to say what that's most similar to,
22 but it's substantially different from a fraudulent transfer
23 claim.

24 And the litigation trustee and the class action
25 representative have different claims, too.

1 THE COURT: So Holdings was a substantial
2 shareholder --

3 MR. DAUCHER: That's correct.

4 THE COURT: -- and received a substantial
5 dividend.

6 MR. DAUCHER: That is correct.

7 THE COURT: It's a fiduciary to whom or is that
8 what's evolving in Canada?

9 MS. HALL: If I could address that?

10 MR. DAUCHER: I'll cede the podium momentarily to
11 my colleague, Laura Hall.

12 MS. HALL: Hi, Your Honor. I'm Laura Hall for the
13 pension administrator.

14 THE COURT: Right.

15 MS. HALL: The theory there is Sears Canada itself
16 was administering its own pension plan. And in connection
17 with issuing the distribute -- the dividend at issue it's
18 alleged that the shareholders of Sears Canada induced and
19 aided and abetted its breach of its fiduciary duties to the
20 plan.

21 THE COURT: Who -- when you say its, who do you
22 mean?

23 MS. HALL: So Sears --

24 THE COURT: Sears --

25 MS. HALL: -- Canada had fiduciary duties as

1 administrators --

2 THE COURT: Right.

3 MS. HALL: -- of its own plan. The directors of
4 Sears Canada and its shareholders who are in -- you know,
5 the ESL parties and the shareholder being Sears Hold Co. are
6 alleged to have induced Sears Canada --

7 THE COURT: So it's like an aiding and --

8 MS. HALL: -- to give the --

9 THE COURT: It's an aiding and abetting --

10 MS. HALL: Exactly.

11 THE COURT: -- of breach of fiduciary duty.

12 MS. HALL: Yeah.

13 THE COURT: Okay. And this is an evolving
14 concept under Canadian law?

15 MR. DAUCHER: That's correct, Your Honor.

16 THE COURT: Okay.

17 MR. DAUCHER: So the delay in distributions,
18 that's, I think, factor two in our favor.

19 There's also no dispute that the Canadian
20 plaintiffs' claims are largely focused on the conduct of
21 third parties, although we apparently have a quibble around
22 how broad or narrow Factor 6 is. But we think that's Factor
23 6 in our favor.

24 The debtors and the committee acknowledge that the
25 Canadian litigation will not result in a subordinated claim

1 and will not result in avoidable judicial lien. That's
2 Factors 8 and 9 in our favor.

3 And perhaps most importantly the debtors admit
4 that granting relief from the stay would avoid needless and
5 duplicative litigation. That's Factors 7 and 10.

6 Their only complaint on that front seems to be
7 that granting relief from the stay will not also resolve
8 their own adversary proceeding. But the debtors admit that
9 adversary proceeding arises from --

10 THE COURT: I --

11 MR. DAUCHER: -- different facts.

12 THE COURT: I actually don't think that's their
13 main issue. I think their -- well, Ms. Marcus can tell me,
14 but I think their main issue is they think that the Sears
15 Holdings part of this litigation is not particularly
16 important in the Canadian context, but would cost a lot of
17 money at this point that may not be well spent by anybody on
18 either side given the uncertainty about the level of
19 distributions.

20 It's not really -- I don't see -- maybe I'm
21 missing it. I don't see a tie in whereby issues in the
22 adversary proceeding in front of me will be determined in
23 the Canadian litigation. So I don't think that's their
24 issue. I think it's just a --

25 MR. DAUCHER: But they actual --

1 THE COURT: -- a money issue.

2 MR. DAUCHER: But they actually -- I agree that
3 they are separately raising a money issue. But they
4 actually make the point repeatedly in their brief that, and
5 we're looking at paragraphs 27 and 70 in their brief where
6 they acknowledge that granting relief from the stay will
7 eliminate duplicative litigation for the Canadian
8 plaintiffs, but will not resolve it, will not eliminate
9 duplicative litigation for the debtors. And they
10 specifically cite the existence of the adversary proceeding.

11 So that may not be convincing. I agree it's not
12 convincing. But it's what they put down on -- in their
13 papers.

14 THE COURT: Okay.

15 MR. DAUCHER: And I agree as well when you say
16 that it doesn't seem that resolving issues in Canada will
17 resolve issues in the adversary proceeding or vice versa.
18 That's right. The debtors admit that the adversary
19 proceeding arises from different facts than does the
20 Canadian litigation. We couldn't agree more. They're
21 separate.

22 But we think those unanswered points alone are
23 sufficient to establish at least a prima facie case for
24 relief from the automatic stay. But I think it's worth
25 looking in detail at what the debtors and the committee to

1 some extent have raised in opposition.

2 First they suggest that the motion should be
3 denied because granting the Canadian plaintiffs relief from
4 the stay risks affording us some sort of improper
5 distributional advancement. That's just not correct. As
6 Your Honor observed at the outset, what we've done is
7 request relief from the stay, to add Sears Holdings as a
8 defendant, and to liquidate our claims. Any claim that we
9 ultimately obtain against Sears Holdings is going to have to
10 ultimately be recovered through these Chapter 11 cases.

11 And there are any number of decisions from courts
12 in this district, from courts elsewhere in the Second
13 Circuit that make the point that prejudice to any other
14 creditors is managed or eliminated by limiting a request for
15 relief from the stay purely to liquidating that --
16 liquidating the claim in another forum.

17 THE COURT: I think that overstates it, but that's
18 fine.

19 MR. DAUCHER: I'm looking specifically at --

20 THE COURT: No. But you wouldn't spend \$100 to
21 liquidate a claim that's only going to get five. So it
22 depends.

23 MR. DAUCHER: It does, Your Honor. And I think
24 the math there is instructive. We have \$500 million
25 Canadian dollars on the table in these disputes, slightly

1 more than that. Even at the two and a half percent
2 recoveries that the debtors are currently projecting, and
3 the debtors are projecting recoveries for unsecured
4 creditors, but even at that two and a half percent recovery
5 level, that's twelve and a half million dollars Canadian of
6 potential recoveries on these claims.

7 The entire litigation budget in Canada for not
8 just Sears Holdings, but the entire litigation as against
9 all the parties is publicly disclosed at 12 million Canadian
10 which includes incidentally the buffer for adverse costs.
11 So this piece of the claim alone, even if recoveries really
12 are as low as two and a half percent, stands to entirely
13 cover the cost of the entire litigation in Canada, not just
14 against Sears Holdings.

15 So if it's a cost benefit analysis this Court's
16 performing, we're clearly on the right side of that
17 analysis.

18 I've already discussed a little bit the debtors'
19 point or the debtors' suggestion that we need to somehow
20 eliminate all potential other litigation, whether we need to
21 solve the adversary proceeding for them by granting it
22 through relief from the stay. Obviously we don't think
23 that's right. But it's worth looking at just how very
24 different these transactions are, these litigations are,
25 excuse me.

1 The Canadian litigation and the adversary
2 proceeding concern different events, arise under different
3 law, and have the debtors in opposite postures. In the
4 adversary proceeding the debtors are attacking any number of
5 transactions. They're not attacking the 2013 dividend.
6 That's why the debtors admit that "the claims in the
7 adversary proceeding and the dividend litigation" -- meaning
8 the Canadian litigation -- "arise from different events."
9 That's the debtors' objection at paragraph 29.

10 And again at paragraph 70, "The transactions at
11 issue in the dividend litigation and the adversary
12 proceeding differ."

13 The adversary proceeding also asserts causes of
14 action under the Bankruptcy Code, Delaware law, New York
15 law, Illinois law, but not Canadian. The Canadian
16 litigation, by contrast, involves claims exclusively under
17 Canadian law. So Canadian law isn't something this Court
18 would have to determine if relief from the stay is granted.

19 Then in the adversary proceeding, this is maybe
20 the most obvious point, the debtors are the plaintiffs.
21 They're asserting that various wrongdoing occurred to --
22 related to all of these different transactions and that
23 assets were stripped out of the U.S. debtors.

24 In the Canadian litigation, by contrast, Sears
25 Holdings would be a defendant who would presumably be

1 arguing that no such wrongdoing occurred with respect to the
2 2013 dividend in which assets were taken from Sears Canada
3 and transferred to Sears Holdings.

4 And as I began with, it's simply not our burden to
5 solve every piece of litigation the debtors are involved in.
6 We need to reduce duplicative litigation and the debtors
7 have admitted in black and white at paragraph 70 of their
8 objection that granting relief from the stay would eliminate
9 at least some duplicative litigation. So I think that's
10 another point in our favor.

11 Now, third, they've claimed that the Canadian
12 Court is not the specialized tribunal and I've got to say I
13 found this one surprising. In support of that assertion
14 they pointed to the website of the Ontario Superior Court of
15 Justice as a whole, which indicates --

16 THE COURT: No. The issue is not the nature of
17 the court. It's the application of Canadian law.

18 MR. DAUCHER: Correct. Specific types of -- so
19 specific types of Canadian law claims and whether that
20 particular court is the best suited to handle it. And
21 there, you know, we could walk through it at length. We've
22 laid it out in our reply brief. But I think what's most
23 telling is you have a decision from the Ontario Court of
24 Appeals which says "The commercial list is a specialized
25 court." And that it's entitled to "deference even from

1 Canadian Appellate Courts." That's the Western Large case
2 that's attached as Exhibit A to our reply brief.

3 So the question is whether this litigation is
4 currently pending before a specialized tribunal with
5 expertise in these areas, complex questions of Canadian
6 commercial law, complex questions of Canadian insolvency
7 law. The Canadian appellate courts themselves have said in
8 black and white, yes, the commercial list is that court, not
9 the Ontario Superior Court as a whole, but the commercial
10 list where this litigation is pending, unquestionably a
11 specialized court.

12 But we can go further than that, which is that the
13 debtors have acknowledged that the factor may weigh in our
14 favor if it doesn't just involve -- if the litigation
15 doesn't just involve garden variety causes of action under
16 Canadian law, but whether there's unsettled questions of
17 Canadian law. And the monitor's publicly disclose, and this
18 was in its 27th report, it's also mentioned again in our
19 reply brief, that it's claim involves an important question
20 of Canadian law as to which there is very little precedent.
21 And that's whether a trans -- whether a dividend, such as
22 the 2013 dividend, can as a matter of law constitute a
23 transfer at an under value.

24 The pension administrator's claims as we discussed
25 a little bit earlier also involve awfully complex and

1 rapidly evolving questions of Canadian law.

2 And given that these are both complex questions,
3 unsettled questions, frankly, important questions of
4 Canadian law it would just be improper for any U.S. Court to
5 get out ahead of the Canadian courts on the issues or to
6 second guess what the Canadian courts are doing.

7 So to be clear, the Canadian plaintiffs don't
8 dispute that in the right circumstances it's appropriate for
9 this Court to decide issues of Canadian law. We know Your
10 Honor is capable of doing that. It's just that this isn't
11 the right context. We have a specialized Canadian court.
12 We have evolving and complex questions of Canadian law. And
13 we have a litigation on these very legal issues and these
14 very facts that's already going forward. The right thing to
15 do is to make sure that the court with the greatest
16 expertise in these particular issues and facts is the one
17 that manages the whole litigation. That's unquestionably
18 the Canadian court.

19 The debtors have fourth argued that somehow
20 granting our motion would open the flood gates to additional
21 motions for relief from the stay. That's a general
22 assertion. They could and do make it in support of any
23 number of oppositions to motions for relief from the stay.
24 It's not particularized our facts at all. It should be
25 given no weight.

1 It also ignores the fact that to the extent
2 there's a risk of flood gates being opened, I would say
3 those flood gates are opened. Last I checked they've
4 already filed three omnibus objections to motions for relief
5 from the stay. People aren't shy about filing those
6 motions, and granting our motion isn't going to encourage
7 them any further.

8 But it also just ignores the Canadian plaintiffs
9 are situated differently and, frankly, the debtors know this
10 which is why they're filing individual objections to our
11 motion whereas we're not -- and rather than lumping us into
12 the omnibus objections.

13 The Canadian plaintiffs are not individual self
14 interested as they termed us creditors looking to obtain an
15 advantage. We're fiduciaries or court officers representing
16 very broad constituencies involved in the proceedings of
17 Sears Canada. This Court, courts in this district, have
18 regularly recognized that Canadian monitors act with
19 fiduciary duties to all stakeholders.

20 We're here in furtherance of those duties, trying
21 to make sure that the Canadian plaintiffs' claims are
22 litigated in as efficient a manner as possible. And we come
23 with orders from the Canadian court respectfully requesting
24 that this Court extend assistance to the monitor, to the
25 litigation trustee, in execution of those duties.

1 So it's just simply not the case that there's this
2 potential avalanche I think was their term of similarly
3 situated parties waiting to file motions. The Canadian
4 plaintiffs stand apart of it.

5 And, anyway, the debtors in this court are more
6 than capable of dealing with motions from non-similarly
7 situated parties who don't deserve relief from the stay.

8 And, finally, and I know I've taken up a fair
9 amount of time, the debtors and the committee have suggested
10 that the motion is premature, that the Court should give
11 them more time to determine creditor recoveries before
12 allowing us to proceed.

13 They've already at least projected that there will
14 be meaningful creditor recoveries as we discussed. And
15 counsel for the monitor's co-movant, the litigation trustee,
16 can, if the Court is so inclined, provide some additional
17 detail on the current status of the Canadian litigation and
18 why it's very important that we receive relief at this time.

19 I'll simply say this. The Canadian litigation
20 needs to move forward, and if it doesn't move forward now,
21 we risk losing this one narrow opportunity to capture cost
22 efficiencies by having everything resolved in one single
23 proceeding.

24 Unless Your Honor has any further questions.

25 THE COURT: Well, I would like to hear the current

1 projection of the schedule of this litigation if I granted
2 the motion.

3 MR. DAUCHER: I'll cede the podium to my colleague
4 --

5 THE COURT: I mean, it's --

6 MR. DAUCHER: -- Neil Oxford.

7 THE COURT: -- already the third week of May and
8 document discovery is kind of ready to be done by the end of
9 June. So I just want to get a sense of how realistic that
10 is.

11 MR. DAUCHER: Thank you.

12 MR. OXFORD: Good morning, Your Honor. Neil
13 Oxford of Hughes, Hubbard & Reed for the litigation trustee,
14 Douglas Cunningham, and for the class representative as
15 well.

16 Picking up on your last question to Mr. Daucher,
17 the time table will be unaffected if Your Honor were to lift
18 the stay and Sears Holding was to be joined as a defendant
19 in the litigation. As Mr. Daucher mentioned there was a
20 hearing in front of Mr. -- Justice McCughen in April where
21 Sears Holding appeared and requested not an adjournment of
22 the whole proceedings, but an adjournment simply of certain
23 motions to strike pending the outcome of the motion that
24 this Court is hearing today.

25 Out of respect for judicial economy and principles

1 of comity Justice McCughen granted that motion. That did
2 not, I think, Mr. Daucher mentioned that the proceedings in
3 Canada are being held up. I would say it differently. I
4 think that's actually not correct. Mr. -- Justice McCughen
5 made no adjustments to the overall timetable. That overall
6 timetable remains in place. As Your Honor has suggested
7 there's going to be discovery very shortly and the various
8 interim steps between now and trial --

9 THE COURT: Have the parties taken discovery of
10 anyone else as -- to meet the June 30th deadline?

11 MR. OXFORD: I don't believe so.

12 THE COURT: Okay. All right.

13 MR. OXFORD: I don't believe so. But just on that
14 point, Your Honor, as I understand it Justice McCughen at
15 that hearing has stated that if the timetable were to slip
16 for any reason, and we all agree it's a fairly aggressive
17 timetable, it would slip only by a matter of weeks. So
18 we're still looking at a trial in the spring of 2020.

19 THE COURT: Okay. And why -- there's two months
20 in between close of document discovery and deposition. Is
21 that customary or is that just because it's summertime or --

22 (Laughter)

23 MR. OXFORD: Having (indiscernible) in Canada I
24 don't remember getting a summer off, Your Honor.

25 THE COURT: Okay.

1 MR. OXFORD: The discovery works a little
2 differently than it does down here, so there's not -- there
3 are depositions as I understand it or examinations of a --
4 of representative witnesses and then there's a slightly
5 complicated and to me unfamiliar process of sorting out the
6 objections to that testimony and filling in blanks in that
7 testimony.

8 So I think that may be why there's that gap.

9 The other point I did just want to mention is that
10 Canadian counsel for the U.S. debtors when they appeared
11 before Justice McCughen repeatedly assured the Court that if
12 leave was granted to lift the stay and to join Holdings as
13 we urge the Court to do, they would try hard not to blow up
14 the schedule and would work to fit in within existing
15 timetables.

16 So as I understand it we are looking very fairly,
17 very squarely at a spring trial in Canada against the
18 (indiscernible) existing defendants. And in our submission
19 it makes much more sense to do that against defendant number
20 15 as well.

21 THE COURT: Okay.

22 MR. OXFORD: Just to pick up on one other question
23 that the Court asked Mr. Daucher, which is why Holdings was
24 not joined kind of ab initio and whether there should be any
25 negative inferences from that, I think the Court was

1 wondering whether that was indicative of their relative
2 importance, I would submit not.

3 The short answer to your -- Your Honor's question
4 is that at the time these claims were approved by the
5 Canadian Court which was late December of 2018 there was
6 still an ongoing sale process. The bankruptcy in the United
7 States was still in a, really in its infancy. And we
8 thought it was more appropriate to wait until the sale had
9 been confirmed and a plan was in place for -- to appear
10 before Your Honor and to request relief from the stay.

11 So it was really out of respect for the ongoing
12 Chapter 11 process. And it's also really just a matter of
13 months. We're talking less than three months between when
14 the Canadian claims were allowed to go forward against the
15 other 14 defendants and when we first started discussions
16 with the U.S. debtors and the UCC to add the 15 defendants.

17 So in my submission no negative inference can or
18 should be made.

19 THE COURT: Okay.

20 MR. OXFORD: Okay. So I think I've probably
21 covered a lot of what I was intending to say already, so
22 I'll be as brief as I can. I just have three points.

23 The first one is that despite their efforts to
24 suggest otherwise, the U.S. debtors are by no means a
25 stranger to the Canadian litigation. They have been

1 monitoring it since the get go.

2 In December 3, 2018 there was a hearing in front
3 of Justice Haney concerning the appointment of the
4 litigation trustee and permission for the monitor to proceed
5 with the transfer at undervalue claims. And we were in
6 attendance at that hearing.

7 After the litigation was approved, as I think Mr.
8 Daucher mentioned, there was a request by Holdings canceling
9 Canada to be added to the service list, which happened. As
10 I mentioned in mid-March we started discussions with the UCC
11 and with the debtors in the hope that they would agree to
12 this motion.

13 So in short answer what's been going on in Canada
14 is a process that has not been foreign by any means to the
15 U.S. debtors. They've been very aware of what's been going
16 on really for the last six months.

17 THE COURT: Okay.

18 MR. OXFORD: That leads to my second point which
19 is there is no reason to delay a decision on the stay. The
20 U.S. debtors and the UCC have had plenty of time to make up
21 their mind. They've had six months, in fact. They don't
22 need any more time. They know exactly what those claims are
23 and they can take their position on that.

24 I would suggest, Your Honor, that that is of
25 particular importance here where a delay is essentially a

1 denial of the motion. We have a limited opportunity. The
2 bankruptcy universe has aligned such that it is an
3 appropriate time to join Holdings to the existing litigation
4 without suffering any meaningful delay up there, if any
5 delay at all.

6 But that window is closing. The train is leaving
7 the station. The horse is about to leave the barn. Pick
8 your metaphor, whatever you want. It's a one-time
9 opportunity that the Court has here.

10 That brings me to my third point, that this motion
11 is a real opportunity for this Court to save a very
12 significant amount of judicial resources and of the parties'
13 resources. We're off to the races in Canada. It's set down
14 for an eight week trial, complicated issues, four claims,
15 many witnesses, probably a dozen or more witnesses. We're
16 going to be doing that in Canada in February, certainly in
17 the spring of 2020. And then if the stay isn't lifted,
18 we're going to come back down to White Plains and we're
19 going to do it all again.

20 THE COURT: You won't have an eight week trial,
21 that's for sure.

22 (Laughter)

23 MR. OXFORD: Something of a relief to me, Your
24 Honor.

25 So in my respectful submission it's hard to think

1 of a more clear cut waste of the parties' resources.

2 The U.S. debtors admit that it's a waste of the
3 Canadian parties' resources and they say, in Canada that
4 doesn't matter. Respectfully, we disagree. As Mr. Daucher
5 says, it matters a great deal. The parties who are before
6 you represent the creditors of the Sears Canada bankruptcy
7 estate. These are the people who lost their pensions.
8 These are the people who lost their livelihood. So I do not
9 think we should be so cavalier about these resources.

10 It's not, however, just our resources. I think
11 it's the resources of the U.S. debtors as well. There's
12 some fuzzy math going on here. I -- it's clear that the
13 U.S. debtors have been monitoring what's going on in Canada,
14 as is appropriate. Absolutely they should. They're -- on
15 their theory of the case they're going to have the same
16 trial again before Your Honor at some point in the future.
17 So they're monitoring it.

18 Then they're going to have to try it again. Under
19 no circumstances, I would submit, does common sense allow
20 anyone to conclude that monitoring one trial and doing it
21 again is cheaper than just doing it once over.

22 THE COURT: Well, there is a natural alternative
23 which is that they continue to monitor the trial. They see
24 how it turns out vis-à-vis the other parties and then they
25 resolve it with you all, depending on how it turns out, not

1 in a trial, but as people usually do in a negotiation.

2 MR. OXFORD: That is certainly one alternative.

3 But it's by no means guaranteed --

4 THE COURT: No, it isn't. That's true.

5 MR. OXFORD: And I think we have the right to
6 press our point not only in Canada against the existing 14
7 defendants. We have a right to press it against Holdings.
8 And if we can get a good settlement, you know, obviously
9 that would be something we would consider. But --

10 THE COURT: Well, they would resolve the claim in
11 the context of what already had happened in Canada.

12 MR. OXFORD: They might resolve the claim.

13 THE COURT: They might. That's the issue. They
14 wouldn't --

15 MR. OXFORD: They might.

16 THE COURT: -- be bound to. And so there is a
17 risk that there would be further adjudication here.

18 MR. OXFORD: Yeah. There's a very significant
19 risk. I mean, if they're participating in the Canadian
20 court proceedings, they don't have a voice. They don't have
21 any objections to the evidence that comes in. They might
22 totally disagree with it. They might think that Your Honor
23 might make a different evidentiary ruling and that would
24 change the outcome of the case. There's -- you know,
25 there's a lot of maybes and a lot of uncertainties.

1 THE COURT: The law would be clear, though.

2 MR. OXFORD: The law may very well be clear.

3 Again, that's -- that assumes that Holdings doesn't take
4 issue with any of those rulings as they apply to them.

5 Again, they're not the before the Court --

6 THE COURT: It's hard for me to imagine --

7 MR. OXFORD: -- in Canada.

8 THE COURT: -- that after a Canadian court had
9 ruled on these issues that I would disagree with it as a
10 matter of -- as an interpretation of the law.

11 MR. OXFORD: It's a fair point, Your Honor. The
12 law may be more clear after we've been to trial in Canada.

13 THE COURT: How much of the eight weeks do you
14 think would actually involve Holdings?

15 MR. OXFORD: I think Holdings would have to be
16 there --

17 THE COURT: It's in the middle of the whole thing.

18 MR. OXFORD: -- for the whole part of it that
19 their claim includes joint and several liability claims by
20 the litigation trustee. So I think they have to be there
21 for the whole piece of the trial.

22 THE COURT: It doesn't sound like it was a
23 controlling shareholder just reading the facts. I mean, if
24 you're talking about a fiduciary, maybe a different concept
25 in Canada, but there is a point where it held that the vast

1 majority of the stock, but there were subsequent --

2 MR. OXFORD: Yeah. As I --

3 THE COURT: -- transactions --

4 MR. OXFORD: -- understand they were the majority
5 shareholder, Your Honor.

6 THE COURT: The whole time?

7 MR. OXFORD: For the relevant period.

8 THE COURT: During the dividend?

9 MR. OXFORD: In 2013. Yeah.

10 THE COURT: Okay. All right. Okay.

11 All right. Thank you. I appreciate the --

12 MR. OXFORD: Thank you. Those are my submissions
13 unless the --

14 THE COURT: Okay.

15 MR. OXFORD: -- Court has questions. Thank you.

16 MS. MARCUS: Good morning, Your Honor. Again --

17 THE COURT: Good morning.

18 MS. MARCUS: -- Jacqueline Marcus on behalf of the
19 debtors.

20 Rather than belabor everything, all the arguments
21 that we made in our objection, Your Honor, which essentially
22 boil down to the fact that we don't believe the Canadian
23 plaintiffs have established that the SONOX factors justify
24 the relief requested.

25 I just want to respond to a couple of the

1 statements made by Mr. Daucher and Mr. Oxford.

2 First, Your Honor, I -- you hit the nail right on
3 the head when you asked your first question which was,
4 couldn't the Canadian plaintiffs have sought to sue Sears
5 Holdings Corporation back in December when they filed their
6 Canadian actions. And of course those actions would have
7 been barred by the automatic stay. But if they thought that
8 Sears Holdings was a critical defendant at that point, they
9 could have filed a motion for relief from the stay back
10 then.

11 Second, Your Honor, the statements that Sears
12 Holdings has been participating in Canada is really very
13 much of an overstatement. Of course we have Canadian
14 counsel that is monitoring, I'll call it more like watching
15 what's going on in Canada. And, in fact, some of our early
16 discussions were should we do anything or should we just let
17 that proceeding take its path without any participation at
18 all. Obviously, the more prudent course was to make sure
19 that nothing happening there would be prejudicing the
20 defendants.

21 Third, with respect to the specialized court, we
22 have cited cases which indicate that a court like the
23 Canadian court, I think it's called the Commercial List, is
24 not the kind of specialized court that the SONOX factors
25 elude to. The SONOX factors relate more to courts like the

1 Patent Court or the Tax Court.

2 In addition, the fact that a Canadian court has
3 issued a ruling that says that the Commercial List is a
4 specialized court shouldn't really bear any weight in this
5 court for application of the SONOX factors.

6 THE COURT: But isn't the question that -- I mean,
7 I look at this as fundamentally a situation where unlike my
8 interpretation of applicable Delaware law, for example, I
9 would have to take expert testimony of Canadian law and I
10 think that's a major difference.

11 MS. MARCUS: We don't disagree with that, Your
12 Honor.

13 THE COURT: Okay.

14 MS. MARCUS: But I think your point that you made
15 at the end of the colloquy about the fact that if the
16 Canadian litigation proceeds and then we're back before the
17 Court liquidating the claims we may know the answer on the
18 Canadian law was very well taken and very important to the
19 Court's consideration here.

20 And in addition, Your Honor, as you well know,
21 liquidation of claims against the debtor is one of the core
22 matters before a bankruptcy court and we think you are the
23 specialized court for determining what claims should be
24 allowed against the debtors.

25 With respect to --

1 THE COURT: Well, how is this except maybe worse
2 for the debtors, different than a situation where the
3 recipient of an alleged avoidable transfer is a debtor in
4 say Florida and the transferor is a debtor say in New York?
5 I mean, it has to get liquidated somewhere. They're both
6 bankruptcy estates. The one difference here is that foreign
7 law would apply.

8 MS. MARCUS: Right. I mean, I don't think it's
9 very different, but I also don't think -- it shouldn't be
10 worse for the debtor than if that were the case of just
11 dueling U.S. bankruptcy cases.

12 THE COURT: Well, all right. But on the other
13 hand, both courts sort of have core jurisdiction over the
14 matter.

15 MS. MARCUS: Uh-huh.

16 THE COURT: And at that point I think you would
17 just look at the impact on the estate where the motion is
18 made. And looking here I -- there's a statement in the
19 brief that the debtors submitted that if the dividend
20 litigation is stayed as against them, their obligation to
21 participate in discovery will be much more limited.

22 But, I mean, are we -- what is the magnitude we're
23 talking about here in terms of costs? I don't really have a
24 sense of that, as to whether -- particularly, let me add one
25 more fact.

1 The trial here isn't slated to begin until next
2 February. It's not going to be any earlier than next
3 February.

4 MS. MARCUS: Uh-huh.

5 THE COURT: By then it's clear to me that the
6 debtors will have a pretty good idea and/or a -- you know, a
7 liquidation trustee or a litigation trustee of their -- the
8 asset side of their estate and should be able to negotiate,
9 I would think.

10 MS. MARCUS: Yes, Your Honor. So let me start
11 with that one and then I want --

12 THE COURT: And --

13 MS. MARCUS: -- to go back --

14 THE COURT: And a cost --

15 MS. MARCUS: -- to the --

16 THE COURT: -- of the trial seems to be the big
17 cost here, not the prep work.

18 MS. MARCUS: Well, I think the cost of everything
19 leading up to February and, of course, because right now we
20 don't know what the exact recoveries of course are going to
21 be --

22 THE COURT: Right.

23 MS. MARCUS: -- hopefully we'll know that by
24 February. But now is when we have to make the determination
25 as to allocation of resources in defending if you were to

1 grant relief --

2 THE COURT: Right.

3 MS. MARCUS: -- from the stay.

4 And so the point was made about, I think Mr.
5 Daucher gave the example of the \$12 million, an estimated
6 potential recovery for the Canadian debtors of \$12 million
7 and the cost -- Canadian maybe -- and the Canadian cost of
8 pursuing a litigation.

9 THE COURT: Right.

10 MS. MARCUS: But that's from the Canadian debtors
11 --

12 THE COURT: No. I --

13 MS. MARCUS: -- point, not from --

14 THE COURT: -- I understand.

15 MS. MARCUS: -- our point.

16 THE COURT: But I --

17 MS. MARCUS: Right.

18 THE COURT: It seems to me -- that's why I'm
19 asking the question. It seems to me that if the debtors
20 would have to -- would -- I would think the debtors would --
21 I would lift the stay to have the debtors -- even if I
22 didn't lift the stay generally, I would lift the stay so
23 that discovery could be taken of the debtors as to the facts
24 on the transfer.

25 So at least between that and the point where

1 you're gearing up for a trial in December and January, the
2 trial being in February, it wouldn't seem to me that there
3 would be a huge amount of money incurred.

4 I don't know, you tell me, I don't have any sense
5 of that.

6 MS. MARCUS: I don't either, Your Honor.

7 THE COURT: Okay.

8 MS. MARCUS: Unfortunately, Canadian counsel isn't
9 here.

10 THE COURT: All right.

11 MS. MARCUS: I did want to go back to when you
12 were talking about the dueling better, you know, which court
13 should hear a case.

14 THE COURT: Right.

15 MS. MARCUS: The Canadian plaintiffs have said on
16 numerous occasions that Sears Holdings Corporation is not
17 the principal target of the Canadian litigation, that the
18 principal claims are not against Sears Holdings, they've
19 said it multiple times. And if that's the case when the
20 Court applies the factors and balances the harms, I think
21 it's incumbent upon the Court to think about a fact that
22 they've said that Sears Holdings is not critical to their
23 case and that's something that the Court should take into
24 account.

25 With respect to the Sonax factors, I did want to

1 respond with respect to --

2 THE COURT: That would argue that some time
3 between now and well before February 3rd both parties would
4 have incentive to settle then, right? I would think.

5 MS. MARCUS: We're always interested in settling.

6 THE COURT: Okay.

7 MS. MARCUS: With respect to factor one under the
8 Sonax factors complete resolution of the issues --

9 THE COURT: Oh, can I interrupt you one more time?

10 MS. MARCUS: Sure.

11 THE COURT: If I don't lift the stay, there's not
12 that same incentive, right, because Sears Holdings is just
13 sort of holding out there.

14 MS. MARCUS: That same incentive right now for us,
15 but certainly either at the conclusion of the Canadian
16 litigation or any time between now and then the debtors
17 would want to avoid the expenses and the lay of litigation
18 of the claims.

19 THE COURT: Am I right, I should have asked you
20 this question. Sears Holdings is not in our U.S. terms, a
21 necessary party, right? You could have this litigation
22 without Sears Holdings?

23 MR. DAUCHER: Your Honor, not -- Eric Daucher on
24 behalf of the monitor. Not being an expert in Canadian law,
25 but I would say the litigation is going forward or has been

1 going forward without our participation.

2 THE COURT: Okay. And no one's argued it as far
3 as I can see that it's a necessary party.

4 MR. DAUCHER: I think that's right, Your Honor.

5 THE COURT: Okay.

6 MS. MARCUS: Okay. That's a factor one.

7 THE COURT: Right.

8 MS. MARCUS: So make a concession, so. We have
9 conceded in our papers and I think it would be foolish for
10 us not to concede that if relief from the stay were granted
11 complete resolution of the issues might be possible, but we
12 note that the Court would be considering, I'll call it, some
13 of the same nucleus of facts in connection with the
14 adversary proceeding.

15 But in that regard and with respect to the
16 importance of factor one, Judge Bernstein in Breitburn
17 Energy has made some interesting comments about factor one,
18 and if you wouldn't mind, Your Honor, I'd like quote 571
19 Bankr. Reporter 59 at page 69, where Judge Bernstein said,
20 "If joining a debtor as a defendant in a multi-defendant
21 case meant that judicial economy always mandated stay
22 relief, this factor would subsume the other --"

23 THE COURT: Right.

24 MS. MARCUS: "-- Sonax factors in many cases and
25 force a debtor to defend against unsecured claims possibly

1 in multiple venues."

2 THE COURT: Clearly.

3 MS. MARCUS: The other statement that Judge
4 Bernstein made in Breithurn, and in that case he granted
5 relief from the stay with respect to certain claims and
6 rejected relief from the stay, with respect to the assertion
7 of certain tort claims.

8 He noted as follows, "The movement remains free to
9 pursue its unstayed claims against the non-debtor
10 counterclaim defendants and file a proof of claim in this
11 court, while the debtors avoid the time and expense of
12 participating in a trial involving numerous parties, when
13 the ultimate distribution to the unsecured class may prove
14 that the value of the claim in bankruptcy dollars is not
15 worth the expense to either party of litigating it." And
16 that's at 571 Bankr. Reporter at 69.

17 THE COURT: Right.

18 MS. MARCUS: The other statement that was made was
19 that resolution of the claim against Sears Holding is
20 holding up the completion of the Canadian insolvency
21 proceedings. And given that the Canadian plaintiffs have
22 only sought relief to liquidate the claim, not to enforce
23 the claim, I can't imagine how that Canadian proceeding can
24 be wrapped up until we're really done with the Sears case
25 and know what the distribution on that claim would be. So I

1 don't think that that's a compelling factor.

2 Let's see if I had anything else. I would also
3 note, Your Honor, that there were a couple of the Sonax
4 factors that weren't mentioned by the Canadian plaintiffs,
5 one of which is a claim covered by insurance. And the
6 answer is that while the individual director defendants are
7 covered by the company's directors' and officers' insurance,
8 the actual entity, Sears Holdings Corporation is not, so the
9 debtors would have to pay the litigation expenses out of
10 pocket, as opposed to being able to look to insurance.

11 The other factor, factor 11 is whether parties are
12 ready for trial. While trial may be eminent, being
13 scheduled for February, the parties are not ready for trial.
14 This is not a case or I should say with respect to three of
15 these actions, it's not a case where the debtor was a
16 defendant in litigation prior to the commencement of its
17 Chapter 11 case. And the litigation had proceeded up to the
18 point of trial. Many of the cases cited by the Canadian
19 plaintiffs have that fact pattern, that's not the case here.

20 And with that, Your Honor, we believe that the
21 stay relief should be denied --

22 THE COURT: Okay.

23 MS. MARCUS: -- and the Court should determine
24 that the Sonax factors don't justify the relief requested.

25 THE COURT: I want to make sure I'm not missing

1 something. I -- there -- counsel for the Canadian
2 plaintiffs are right, there are references in the debtor's
3 objection to the adversary proceeding in front of me, that
4 asserts under U.S. law somewhat similar claims but related
5 to different transactions at different times.

6 I didn't get the sense that the debtors were
7 concerned about any preclusive effect on that litigation
8 that would stem from their participation in the Canadian
9 litigation, right. That's not an issue?

10 MS. MARCUS: That's not our argument, Your Honor.

11 THE COURT: Okay. So that adversary proceeding
12 would just go ahead and separately.

13 MS. MARCUS: Yes, but the question is, you know,
14 could we spare the court getting embroiled in the nucleus of
15 facts related to whether and to what extent there was, you
16 know, a plan to divert assets from either Sears or from
17 Sears Canada for the benefit of certain shareholders. That
18 general theme exists in both litigations.

19 THE COURT: But it's really a pretty remote theme.

20 I mean, it's --

21 MS. MARCUS: They are different claims, Your
22 Honor.

23 THE COURT: Yeah. I mean, it's not even, you
24 know, like --

25 MS. MARCUS: The --

1 THE COURT: -- my sweet, Lord, and one fine day,
2 it's not the same -- it's not even the same tune really.

3 MS. MARCUS: Yeah, the adversary proceeding
4 concerns a Sears Canada transaction in 2012.

5 THE COURT: Right.

6 MS. MARCUS: And the Canadian litigation involves
7 the 2013 dividend.

8 THE COURT: Okay.

9 MS. MARCUS: Sears Canada is involved but it's a
10 different transaction.

11 THE COURT: Right. Does the -- but the 2012, is
12 that a Canadian transaction, Canadian law transaction or
13 U.S. transaction?

14 MS. MARCUS: I think it was another dividend or
15 recap.

16 MS. HALL: I thought it was the U.S. law spin-off
17 of the Canadian shares to the shareholders of Sears
18 Holdings, but --

19 UNIDENTIFIED: It is, so it's U.S. law.

20 MS. MARCUS: Thank you, Your Honor.

21 MS. HALL: I think Mr. Qureshi or Ms. Brauner.

22 THE COURT: Okay.

23 MS. BRAUNER: Good morning, Your Honor, Sara
24 Brauner, Akin Gump on behalf of the committee.

25 Just very briefly, we rise to echo the points that

1 Ms. Marcus made and to highlight only a couple of points
2 that were made in the Canadian plaintiffs reply that we
3 believe are either misguided or disingenuous or belied by
4 the specific facts here.

5 The first is, and this was said a number of times
6 in the Canadian plaintiff's papers that the debtor's
7 disclosure statement, namely the most recent disclosure
8 statement that was filed conclusively demonstrates that
9 there are material recoveries for unsecured creditors.

10 Respectfully as Your Honor is aware, and as the
11 debtors are certainly aware, the committee does not
12 necessarily share that view, and has very real concerns that
13 we are looking at administrative insolvency, not just on a
14 deep consolidated basis, but also on a consolidated basis.

15 So the assumption that there must be recoveries
16 here and therefore there's no issue at this juncture of
17 determining claims unfortunately may be incorrect. And
18 there are a number of contingencies worth hundreds of
19 millions of dollars, both in the debtor's estimate and in
20 ours that could push one way or the other the availability
21 of such recoveries.

22 Similarly the point that the committee is somehow
23 disingenuous by believing there are potentially recoveries
24 here as a result of the litigation is inaccurate. Just
25 because there may be valuable causes of action that would be

1 pursued by the trust, by the debtors, by some combination
2 does not in turn mean that there are recoveries for
3 unsecured creditors at each debtor entity or overall.

4 The next point, there's a lot of focus on --

5 THE COURT: Can I -- Holdings is Holdings, it's
6 above everything.

7 MS. BRAUNER: Holdings is Holdings, that's right.

8 THE COURT: Okay.

9 MS. BRAUNER: The second point that permeates a
10 lot of these pleadings is back and forth on judicial economy
11 and is it more convenient as the Canadian plaintiffs say to
12 have one trial instead of two. And Ms. Marcus touched on
13 this, there is no circumstance under which there will be one
14 trial, uncertain of the underlying facts here. The real
15 question is will Holdings have to defend in two
16 jurisdictions.

17 THE COURT: That's what I don't -- that was the
18 question I asked Ms. Marcus. I'm having a hard time seeing
19 that. Why would there be --

20 MS. BRAUNER: So it's --

21 THE COURT: -- the same issues, why would there be
22 -- put it differently, why would there be -- why wouldn't
23 there -- why would that happen, I don't understand. Is it
24 different transactions?

25 MS. BRAUNER: Your Honor is correct and Canadian

1 plaintiffs are correct that they are different causes of
2 action, primarily by way of the fact that we're dealing with
3 different laws. The transactions certainly are not the same
4 transactions. I think it does come down to, in some
5 respects, the theory of the cases.

6 You have a course of conduct of similar players,
7 you have as Ms. Marcus eluded to perhaps an argument of
8 asset stripping that pervaded a number of years and numerous
9 transactions. And so while yes, there are certainly
10 distinct fact patterns and distinct transactions here, the
11 real question is, how convenient on balance or inconvenient
12 is it to resolve the Sears Holdings issues in connection
13 with a trial that necessarily regardless of what happens in
14 Canada will be proceeding in the U.S.

15 And the relative harm, balance, however you want
16 to frame it to Sears Holdings having the ability to litigate
17 the limited and probably removable from the remainder of the
18 Canadian action claims, in connection with similar
19 discoveries, similar facts before Your Honor or a U.S.
20 Court.

21 That's not to say the legal issues are the same
22 and we agree with Ms. Marcus that Your Honor is correct,
23 there will be a need for Canadian law declarations here of
24 some sort, to the extent this Court addresses Canadian law
25 issues.

1 But I think the point that Your Honor made about
2 perhaps keeping Sears Holdings out of the Canadian
3 litigation, allowing the litigation to proceed and
4 reassessing at a time when perhaps there is a lot more
5 clarity on number of issues that could be gating items here
6 perhaps makes some sense --

7 THE COURT: Although the issue is we don't --

8 MS. BRAUNER: -- and potential to dual litigation.

9 THE COURT: The problem is we don't have any
10 assurance that that would happen.

11 MS. BRAUNER: That's correct. But I think --

12 THE COURT: You know, just as a matter of trial
13 strategy I'm not sure you'd want to be on offense or defense
14 in the same trial.

15 MS. BRAUNER: Do you want to be on offense and
16 defense in two different jurisdictions on the same issue? I
17 mean it's --

18 THE COURT: Maybe so. Maybe so actually.

19 MS. BRAUNER: I mean I think the question really
20 comes down to when you look at the parties in the United
21 States, you look at the debtors whose financial position is,
22 you know, challenging at best, and you look at
23 understandably a financial position of parties in Canada
24 that perhaps does not fare much better, you're going to have
25 two trials.

1 The question is, in how many different places does
2 Holdings, and frankly, do Holdings creditors have to
3 litigate. And that's something that I think might be a
4 little bit lost. To the extent that there are actions
5 proceeding in the United States whether they're commenced by
6 the debtors or a liquidating trust or some other party in
7 interest, there's a real opportunity for unsecured creditors
8 to participate in things that will directly impact creditor
9 recoveries.

10 And as Your Honor is aware, the committee and
11 unsecured creditors have strong views about the course of
12 conduct and the governance that took place prior to the
13 petition date, and basically precluding that participation
14 by conducting this in Canada for costs and other --

15 THE COURT: But again --

16 MS. BRAUNER: -- efficiency reasons is tricky.

17 THE COURT: -- you're on defense --

18 MS. BRAUNER: You are.

19 THE COURT: -- and it's different law and
20 different procedures.

21 MS. BRAUNER: That's right. But in order for the
22 creditors to participate separately from the debtors which
23 may be something that ultimately the creditors need to do,
24 it would be yet another set of counsel to get up to speed
25 and to participate in presumably not so much discovery but

1 in preparation for trial and participation in trial.

2 So it's just on balance, to the extent there is an
3 easy way to resolve or at least a convenient way to resolve
4 some of these issues here, we just believe it should be a
5 consideration.

6 THE COURT: Okay.

7 MS. BRAUNER: Thank you, Your Honor.

8 THE COURT: All right. Thanks.

9 Okay. Anything else?

10 MR. OXFORD: Your Honor, if I may just address a
11 couple of few points for the record. Neil Oxford, Hughes
12 Hubbard Reed for the litigation trustee.

13 Just picking up on Ms. Brauner's point, I confess
14 I'm a little confused about participation of the creditor's
15 committee in the Canadian litigation. As I understand the
16 plan, the committee is going to dissolved in a couple of
17 months anyway, so I don't think --

18 THE COURT: Well, a representative of creditors.
19 Just like the -- I mean, we don't have the monitor, but you
20 have a litigation trustee, for example.

21 MR. OXFORD: Who may be able to --

22 THE COURT: One of the plaintiffs is a litigation
23 trustee in Canada.

24 MR. OXFORD: Perhaps in consultation with the
25 debtor, Your Honor, I take the Court's point.

1 Two quick points, we're happy to talk settlement
2 any time, any day. I think the universal rule applies in
3 Canada just as it does here, nothing focuses parties' mind
4 on settlement like a trial date. So we would respectfully
5 say yes to that, lifting the stay would be the best way to
6 focus the mind to get involved in the litigation, and it
7 also captures the proficiencies that we discussed earlier
8 with Your Honor.

9 If there's a partial lift of the stay just to
10 allow discovery, I'm -- then ultimately there is no
11 settlement, which we would all obviously hope there is, then
12 all of those efficiencies are lost, my horses left the barn
13 and is galloping around the field, and that opportunity is
14 for cost savings that has been lost.

15 THE COURT: Okay.

16 MR. OXFORD: And just one last thought. If -- and
17 I'm not suggesting Your Honor should have any concerns about
18 the conduct of the case in Canada, Your Honor may consider
19 if it's appropriate to have a discussion with Justice
20 McKewen (ph) who is the case management judge up there. I
21 raise it only for the Court's consideration.

22 THE COURT: For litigation of this kind do you
23 know what professionals normally charge per hour in Canada?

24 UNIDENTIFIED: We're consulting with one Canadian
25 lawyer in the court, Your Honor.

1 MR. DAUCHER: Your Honor, I'm informed that the
2 rate would typically at the higher end be between 750 and
3 1,000 Canadian per hour --

4 THE COURT: Okay.

5 MR. DAUCHER: -- so 70 percent of that and change
6 for U.S. purposes.

7 THE COURT: Okay. All right. I have before me a
8 motion by the plaintiffs in four pending litigations that
9 are all being administered by one judge in the Canadian
10 commercial court in connection with the CCAA case of Sears
11 Canada for relief from the automatic stay, so that a debtor
12 in this case, Sears Holdings Corporation, can be joined as a
13 defendant in three of those pending litigations and that
14 litigation can proceed against it in the fourth which was a
15 prepetition litigation where Sears Holdings had already been
16 named as a defendant.

17 Normally the automatic stay remains in place in
18 Chapter 11 cases with respect to unsecured claims, which is
19 what these unliquidated claims are, as would be asserted
20 against Sears Holdings in Canada.

21 However, Section 362(d)(1) of the Bankruptcy Code
22 provides in part that upon request of a party in interest
23 and after notice of a hearing, the Court shall grant relief
24 from the stay quote for cause. Cause is not defined in the
25 Code itself, but the 2nd Circuit has laid out various

1 factors that a Court should consider when being asked to
2 lift the stay to permit an unsecured claim to be liquidated
3 in another forum.

4 See In Re Sonax Industries, Inc., 907 F2d 1280,
5 1286, 2nd Circuit 1990, "One, where the relief would result
6 in partial or complete issue resolution; two, lack of
7 connection with or interference with the bankruptcy case;
8 three, whether the other proceeding involves the debtor as a
9 fiduciary; four, whether a specialized tribunal with
10 necessary expertise has been established to hear the cause
11 of action; five, whether the debtor's insurer has assumed
12 full defense responsibility; six, where the action primarily
13 involves third parties; seven, whether litigation in another
14 forum would prejudice interest of other creditors; eight,
15 whether a judgment arising from the action is subject to
16 equitable subordination; nine, whether the movant's success
17 in the other proceeding would result in a judicial lien
18 avoidable by the debtor; ten, the interest of judicial
19 economy and expeditious and economical resolution of
20 litigation; eleven, whether parties are ready for trial in
21 the other proceeding; and twelve, the impact of the stay on
22 parties and the balance of the harms."

23 As with many multi-factor tests, one needn't apply
24 all of the factors, some of which will never -- will not be
25 present as is the case here. And as a practical matter many

1 of these factors all focus on the same set of issues, which
2 for purposes of this motion really come down to the impact
3 of lifting the stay on the debtor's estate and the conduct
4 of this Chapter 11 case and the effect of not lifting the
5 stay on the movants.

6 To my mind questions of judicial economy, partial
7 or complete resolution, and the like is a subset of those
8 types of issues because the administration of a bankruptcy
9 case is all about efficiency and resolving matters fairly,
10 but expeditiously and efficiently.

11 Having heard the parties and also reviewed their
12 lengthy and informative briefing, which includes also a
13 concession or agreement by the Canadian plaintiffs that they
14 will waive any claim for punitive or exemplary damages, thus
15 obviating the need for this Court to review those types of
16 damages, if in fact, awarded and to consider whether they
17 should be subordinated or not.

18 I conclude that the stay should be lifted to
19 permit the claim or claims to be liquidated in the Canadian
20 proceeding. I say that primarily because I believe that
21 these claims although also asserted in this case in light of
22 the bar date established by the Court are primarily and in
23 fact I believe wholly Canadian law claims, and ultimately of
24 far greater importance to Canada than the U.S.

25 They involve issues of the corporate governance of

1 Canadian companies and transfers that may or may not be
2 avoidable under Canadian law. It appears clear to me and is
3 acknowledged by one of the plaintiffs that such claims at
4 this time at least are uncertain under Canadian law or that,
5 in other words, at least in some respects, the Canadian
6 court would be acting on a relatively blank slate in
7 deciding such issues.

8 Given that fact, I believe that I would
9 appropriately decline to adjudicate such a claim if there is
10 a parallel proceeding that also would not unduly disrupt or
11 impair the case before me.

12 See generally the discussion in *In Re Picard*, 917
13 F3d 85, 2nd Circuit 2019 at 103. There, of course, the 2nd
14 Circuit determined that to the contrary the claims at issue
15 were in fact centered under U.S. law, but the Court's
16 thoughtful analysis of how U.S. courts should approach
17 issues that are fundamentally governed by and the primary
18 importance to a foreign country gives me guidance here.

19 I further conclude that lifting the stay would not
20 unduly affect the conduct in an adverse way of this Chapter
21 11 case. The Canadian court has already laid out I think
22 more than a tentative schedule for the litigation which
23 contemplates the completion of document discovery at the end
24 of June, the completion of examinations, which are not
25 exactly like our depositions but close enough in September

1 of this year, and a trial in early February.

2 It's clear to me that the debtors would be at a
3 minimum monitoring that process. Further, the debtors seem
4 to acknowledge in their objection that they also might
5 properly be subject to discovery in that process, even if
6 not named as a defendant.

7 Clearly, the costs of participating at that level
8 as opposed to a named defendant would be less for the
9 debtors, but I believe that one way or another, these claims
10 do need to be liquidated. And the costs of liquidating such
11 claims if one went to trial would be at least as high I
12 believe here, if not higher.

13 It also appears to me that the opportunities to
14 reach a settlement of these claims, taking into account not
15 only the claims merits, but also the cost of litigation and
16 the ultimate likely cents on the dollar recovery of any
17 liquidated damages result are far from precluded, and in
18 fact, will be as likely if I lift the stay as if I do not.

19 It appears to me that most of the costs would take
20 place fairly soon before and during the trial which is
21 projected to be for several weeks. At that point, discovery
22 will have been complete and the plaintiffs all but whom are
23 fiduciaries for a bankrupt estates and creditors would have
24 an incentive as would the debtor to negotiate at that point
25 to avoid additional costs.

1 It also does not appear to me that the conduct of
2 this litigation would have any preclusive effect on the
3 highly important to this case pending adversary proceedings
4 and any further adversary proceedings that are contemplated
5 by estate fiduciaries.

6 The result obviously I don't believe would be
7 entitled to any preclusive effect and even the application
8 of comity would be tenuous as to those other causes of
9 action since they appear to me to be governed by U.S. law
10 and involve totally different fact patterns.

11 I appreciate that at this particular time in these
12 cases the debtors are relatively cash poor. And that is a
13 concern because lawyers always want to have assurance that
14 they will be paid. On the other hand, again, it appears to
15 me that the early stages of the litigation here will not be
16 particularly costly to the debtors above the costs that they
17 would be incurring anyway if I did not lift the stay in
18 monitoring the litigation and/or and participating discovery
19 as a non-party to it.

20 Each one of these types of cases really involves a
21 detailed factual analysis as shown by my colleague Judge
22 Bernstein in not only the Breitburn case cited during oral
23 argument, 571 B.R. 59, Bankr. S.D.N.Y. 2018, but also In Re
24 Sun Edison, Inc., 557 B.R. 303, Bankr. S.D.N.Y. 2016.

25 In that case, for example, the debtors were highly

1 focused on developing a plan, selling their assets, et
2 cetera and had a legitimate concern about opening the
3 floodgate for other litigation if a stay was lifted here.

4 In that case also, the litigant was seeking to
5 pursue litigation that was in many respects the crux of the
6 whole case, which clearly the bankruptcy court wanted to
7 keep a finger on.

8 In Breitburn, the issues really focused on
9 efficiency and the position of the various or the options on
10 how the various claims could be liquidated. Here, I don't
11 believe that this ruling will open the floodgate, in fact, I
12 have not granted stay relief I believe in any of the other
13 instances where litigants have moved for relief from the
14 stay except where there's a clear light to insurance. And I
15 frankly don't see any reason to deviate from that course at
16 this point.

17 However, given that this litigation is clearly
18 more important as a matter of Canadian law and while it is
19 not a case where discovery is completed, in fact, it really
20 hasn't started, it is fair to say that a trial will occur in
21 this matter I believe as soon as or faster than the trial
22 would occur in my case on these claims, and will not
23 interfere sufficiently with my case to prevent that from
24 happening or to sever Sears Holdings from the process.

25 So in light of all of that, I'll grant the motion

1 as modified in the papers and lift the stay to let the
2 claims be liquidated.

3 So I'll ask counsel for the movants to submit the
4 order. You don't need to formally settle the order, but you
5 should circulate it to counsel for the committee and the
6 debtors, so that they can make sure it's consistent with my
7 ruling.

8 MS. PESHKO: Your Honor, for the record, Olga
9 Peshko, Weil Gotshal for the debtors.

10 THE COURT: Good morning.

11 MS. PESHKO: As stated earlier in the record, Your
12 Honor, the next item on the agenda is adjourned.

13 THE COURT: Right.

14 MS. PESHKO: That's the William Juiris motion for
15 relief from the stay.

16 So the next item we have is the motion of Liberty
17 Insurance Corporation for relief from the stay. Its counsel
18 is appearing, I can see the floor.

19 THE COURT: Okay. Is anyone here on the phone for
20 Liberty Insurance?

21 (No response)

22 THE COURT: All right. Well, maybe they decided
23 not to speak given one of my remarks during the last hearing
24 with my ruling. Let me just check to make sure they're not
25 on the call in list. I don't believe they are and I think

1 that's understandable because the motion is really couched
2 as a request to lift the stay so it'd go against insurance.

3 MS. PESHKO: That's right.

4 THE COURT: But there isn't any insurance.

5 MS. PESHKO: No.

6 THE COURT: As stated by the debtor's objection.

7 So I will deny the motion based on those facts.

8 MS. PESHKO: Thank you, Your Honor, we'll submit
9 an order.

10 The next item is the motion of Rosa Melgar for
11 relief from the stay.

12 THE COURT: Okay. Is anyone here or on the phone
13 for Ms. Melgar?

14 (No response)

15 THE COURT: All right. I believe that's
16 understandable as well, this is the same type of motion.
17 The motion was made in the hopes that there would be
18 available insurance to cover this claim. However, as stated
19 in the debtor's objection to the motion, there isn't.
20 That's clear from the attachment to the motion and in light
21 of that, and in light of the status of the litigation in
22 that, that the movant is requesting the stay be lifted to
23 let proceed, I'll deny the motion.

24 As noted in the two cases I cited in my ruling,
25 the Breitburn and Sun Edison case, it's the rare case where

1 the stay is lifted to permit litigation to proceed and the
2 facts just don't warrant it here.

3 MS. PESHKO: Thank you, Your Honor, we'll submit
4 an order.

5 THE COURT: Okay.

6 MS. PESHKO: The next motion is a motion of
7 Winters Industry for allowance and payment of administrative
8 expense claims, Your Honor.

9 THE COURT: Okay.

10 MR. FAIL: Good morning, Your Honor, Garrett Fail,
11 Weil Gotshal & Manges for the record.

12 Before we turn to the next item in isolation, the
13 next and final six items on the agenda are all related, Your
14 Honor.

15 THE COURT: Right.

16 MR. FAIL: They're agenda items 11 through 16.
17 Your Honor will note that the debtors filed an omnibus
18 objection to all of the motions, that's at Docket No. 3883.
19 There was a lot of paper already, we felt we would
20 consolidate the reply to synthesize the arguments that were
21 made and reduce the burden on the Court.

22 In the objection we summarized and responded to
23 the various requests. There are essentially three points
24 that were made by various parties. In general, the parties
25 sought the allowance of claims pursuant to 503(b)(1) of the

1 Bankruptcy Code. They sought in the alternative allowance
2 of claims for the same claims under Section 503(b)(9).
3 These are for prepetition claims. And then they sought
4 payment, one party in one part of the motion, sought payment
5 for postpetition claims.

6 As the debtors set forth in their objections, none
7 of the parties is entitled to a claim pursuant to Section
8 503(b)(1) under the 2nd Circuit definition of administrative
9 expense claims.

10 With respect to the 503(b)(9) requests, the
11 debtors made clear their position that claimants can't use
12 an inappropriate motion practice to cut short the debtors',
13 and all parties in interests' time to reconcile and allow
14 claims or to avoid the automatic stay.

15 And third, with respect to one part of one
16 movant's motion we explained why a particular payment wasn't
17 made.

18 Your Honor, the UCC has joined with a qualified
19 joinder the debtors' position agreeing importantly with
20 respect to the 503(b)(1) analysis and with respect to the
21 process for 503(b)(9) claims to be reconciled and allowed.

22 I assume that the Court has reviewed the pleadings
23 and is familiar with the case law. As the 2nd Circuit has
24 instructed, priority should be narrowly construed because
25 any priority given to one creditor is done to the detriment

1 of all other creditors.

2 I'll defer to the Court as to the most efficient
3 means to proceed this morning, but didn't want to have one
4 party go without introducing them altogether. I'm also
5 happy to answer any questions the Court may have of the
6 debtors at this point.

7 THE COURT: Okay. I have two orders dealing with
8 claim procedures in this case. There's an order dated
9 February 22, 2019, the bar date order which in addition to
10 setting a bar date for claims generally sets it for claims
11 under Section 503(b)(9) of the Code, and sets out a
12 procedure for then dealing with those types of claims.

13 I also have an order dated March 28, 2019 that
14 lays out claim objection procedures, claims settlement
15 procedures and claims hearing procedures. It's clear to me
16 that the first order applies to 503(b)(9) claims and I don't
17 think anyone's disputing that.

18 Are the debtors asserting that to the extent a
19 claim is a 503(b)(1) claim, the latter order, the March 28th
20 order should govern?

21 MR. FAIL: Your Honor, these parties -- instead of
22 speaking in the abstract, with respect to these parties'
23 motions I believe they filed proofs of claim for each of
24 them.

25 THE COURT: Okay.

1 MR. FAIL: They've asserted that they were
2 prepetition claims. In those claims, they've asserted in
3 some instances probably 503(b)(9) priority, they're also
4 asking for 503(b)(1) priority for the same facts and
5 circumstances.

6 THE COURT: Okay.

7 MR. FAIL: We don't believe that they're 503(b)(1)
8 claims and we don't believe that creditors should add or
9 enhance a priority to get to the head of the line to then
10 reconcile a general unsecured.

11 THE COURT: Well, maybe I wasn't clear in my
12 question. It sounds like you want me to decide today -- the
13 others, the claimants clearly do -- whether they have
14 asserted a 503(b)(1) claim, and not to channel them into the
15 claims objection and settlement procedures in the March 28th
16 order.

17 MR. FAIL: Your Honor, that's the debtors'
18 request. We think the law is clear on the --

19 THE COURT: So you'd like to get the issue done
20 with?

21 MR. FAIL: To prevent additional motions or
22 requests.

23 THE COURT: Okay.

24 MR. FAIL: If Your Honor wants to defer them all,
25 the debtors' position would be that's fine too.

1 THE COURT: Well, it may not make a lot of sense
2 because there seems to be --

3 MR. FAIL: Sought some certainty, we thought that
4 was an easier issue.

5 THE COURT: The one point that I am hesitating
6 over is that outside of a common fact pattern, which is that
7 the transaction was entered into prepetition, I don't think
8 I should be deciding today anything else under 503(b)(1).
9 And there -- I mean, you may contend, for example, that a
10 claim didn't fall under 503(b)(1) for some other reason,
11 other than the fact that it was a prepetition transaction.
12 That's not really believed or dealt with in these claims, I
13 don't think, that are before me today.

14 MR. FAIL: Right. Your Honor, the debtors'
15 position is that the movant bears the burden to prove his
16 claim. Each of the motions is pending requesting 503(b)(1);
17 we're simply saying those motions should be denied in part
18 with respect to that.

19 THE COURT: In other words, just to be -- to get
20 down to the nitty gritty --

21 MR. FAIL: Yeah.

22 THE COURT: -- I don't think that what I should be
23 doing today is going through particular invoices and saying,
24 oh, yes, this is postpetition, oh, yes, this is prepetition.

25 MR. FAIL: We agree.

1 THE COURT: That should be the claims procedures.

2 MR. FAIL: We agree.

3 THE COURT: What I should be going through today,
4 I gather both sides want me to do, is to deal with the legal
5 issue that the claimants have raised, which is that as long
6 as goods are received by the debtor postpetition,
7 notwithstanding when the transaction actually occurred or
8 the consideration was provided, they have a postpetition
9 claim.

10 MR. FAIL: Your Honor used the word "received."
11 The word "received" is open to interpretation --

12 THE COURT: It's not in the statute.

13 MR. FAIL: That's our point, Your Honor. And --

14 THE COURT: It's not 503(b)(1).

15 MR. FAIL: That's our point.

16 THE COURT: But that's the only issue that I think
17 is before --

18 MR. FAIL: So I would say the appearance --
19 they're saying --

20 THE COURT: -- me today.

21 MR. FAIL: I agree, Your Honor, and I think we
22 just heard -- I hope we've heard your answer on that. The
23 appearance of goods in America doesn't determine 503(b)(1)
24 priority where we've taken title, ordered, and incurred an
25 obligation prepetition.

1 And so the -- you know, a deviation from the clear
2 2nd Circuit Southern District precedent would add ten to a
3 hundred million dollars of additional claims that the
4 debtors can't afford in these cases.

5 THE COURT: Okay.

6 MR. FAIL: I'll cede the podium, Your Honor, but
7 I'm happy to answer any other questions.

8 THE COURT: Okay.

9 MR. SCHWARTZ: If I may, Your Honor, Jeffrey
10 Schwartz with Cole Smith on behalf of Winters Limited and to
11 be clear for the record, I've not asked you to look at an
12 invoice today.

13 THE COURT: Okay.

14 MR. SCHWARTZ: I had filed this motion on behalf
15 of my client in December. I, at the debtors' request,
16 didn't press to have it heard because of the pending
17 matters. And then a couple of months ago, the debtors told
18 me that they agreed with the amount of the claims to the
19 penny.

20 THE COURT: I'm sorry?

21 MR. SCHWARTZ: They agreed to the amount of the
22 claim to the penny, but they were applying as to the
23 administrative claim and obviously there are administrative
24 claims asserted and 503(b)(9) claims that we're asserting.
25 And I just filed the initial reply just to present to the

1 Court that fundamental question, is the Court applying
2 constructive receipt. I'm talking about 503(b)(1) not
3 503(b)(9) --

4 THE COURT: Right, because 503(b)(9) is governed
5 by my February order.

6 MR. SCHWARTZ: Right. So I'm not putting that
7 before the Court now.

8 THE COURT: Okay.

9 MR. SCHWARTZ: The interpretation of 503(b)(1)
10 under applicable Supreme Court and 2nd Circuit law does
11 require harmonization of two sections in the same section,
12 harmonization.

13 So you have under the 2005 Act, you have Congress
14 acting, Congress amended together in a separate subchapter
15 546(c) and added 503(b)(9). (b)(9) then -- so Congress has
16 established a policy as to vendor claims.

17 Congress had determined, and I'm cutting to the
18 chase here, Congress had determined that vendor claims when
19 they're at least interpreted by the 3rd Circuit the actual
20 receipt rule that vendor claims prepetition-based agreements
21 when the goods are delivered actually received by the debtor
22 in 20 days preceding the petition date, those goods are
23 entitled to 503(b)(9) administrative priority.

24 So then what the debtors have posited to you, and
25 I understand, this estate currently is essentially

1 administrative insolvent. I understand that they don't have
2 the money to pay these claims, and we're not looking for
3 money today. Winters is not asking you to order these
4 claims to be allowed and paid today. I understand all of
5 that. And I think most of my colleagues do.

6 THE COURT: Most do, I think there are a couple of
7 requests for immediate payment.

8 MR. SCHWARTZ: And I winced when I read that
9 because look at the disclosure statement, you'd know that
10 this is one of these --

11 THE COURT: Right.

12 MR. SCHWARTZ: -- novel situations where 139
13 million of 503(b)(9) money is to come from the buyer, as
14 well as 166 million of other payables money, as well as
15 there's 52 million of cash being withheld, cash inventory
16 being withheld by the buyer, and given the fact that the
17 estate has filed a claim for \$2 billion accusing the buyer
18 controlling insiders of actual fraud, self-dealing, lack of
19 good faith, as appropriate fiduciary one can't really be
20 saying why that, that that's going to be resolved any time
21 soon, if past is prologue and we see in the disclosure
22 statement that's listed as an asset at face, and I don't
23 know, I haven't talked to any claims buyers, but it's hard
24 to imagine anyone would pay face for that.

25 So I get the distress --

1 THE COURT: Okay.

2 MR. SCHWARTZ: -- the administrative distress and
3 I think my colleagues do, but there's always hope, Your
4 Honor.

5 So I just want a couple -- for the record, I want
6 to make hyper abundantly clear that when the debtor says six
7 movants impermissibly seek to leap ahead of thousands of
8 other creditors in both priority of payment and priority of
9 the loss of the prepetition claims, that's false, it's just
10 untrue.

11 I'm just trying to get -- Your Honor referred to
12 fairness early. Your Honor referred to clarity of law
13 earlier on today's docket. And the point is, there are
14 plenty of administrative claimants who were they to have
15 this clarity, I mean, what would my client do if Your Honor
16 determines 503(b)(1) that it's still the constructive
17 receipt rule and then by implication under 503(b)(9) it's
18 constructive receipt rule.

19 Your Honor said last month that, oh, three to five
20 years out, maybe there will be a couple of cents or three
21 cents, some nominal amount. So are they going to pay legal
22 fees to get these claims, you know, allowed an amount. I
23 already know what the amount is anyway.

24 The only reason any party, any of the foreign
25 vendors is here is -- including -- I'm here on behalf of my

1 client is simple. 503(b)(9) as interpreted by the 3rd
2 Circuit is clear, there is an absolute obligation in
3 interpreting the law per the Supreme Court and the 2nd
4 Circuit. And all these cases they've cited are pre-2005.

5 THE COURT: No, they're not. Listen, I'm going to
6 cut through this.

7 MR. SCHWARTZ: Yeah.

8 THE COURT: The 2nd Circuit -- I'm sorry, the 2nd
9 Circuit has not ruled on the proper interpretation of the
10 word "received" in Section 503(b)(9).

11 MR. SCHWARTZ: Yes, Your Honor.

12 THE COURT: And right now, as far as the 3rd
13 Circuit is concerned two judges ruled one way, they happen
14 to be trial judges, and the 3rd Circuit ruled the other.

15 But one thing is clear, they were interpreting a
16 word. The word was "received." That's in the specific
17 provision, 503(b)(9), "received." And the 3rd Circuit's
18 case, World Import was all about what Congress meant when it
19 used that word, the word "received" in 503(b)(9).

20 MR. SCHWARTZ: Yes, Your Honor.

21 THE COURT: It assumed, that is the 3rd Circuit
22 assumed, that it was incorporating UCC law as then known as
23 an implied meaning for the word "received," whereas the
24 trial courts said, well, since foreign vendors don't use the
25 UCC, that maybe you should apply the convention on

1 contracts. And the inco (ph) terms governing it, which are
2 incorporated in it. But it's all geared to interpreting a
3 word in one statutory section, 503(b)(9). That word doesn't
4 appear in 503(b)(1). 503(b)(1) as interpreted by the
5 Circuit and by the district and by others after 2005, has a
6 very different formulation, which says, "after notice and a
7 hearing, there shall be allowed administrative expenses, ...
8 including the actual necessary costs and expenses of
9 preserving the estate." And the 2nd Circuit has held that
10 that includes two things; actual and necessary, and estate.
11 So you have to have a transaction with the estate, with the
12 debtor in possession or the trustee. It's a totally
13 different statutory framework.

14 Now, so I think your argument just comes down to,
15 well, there are illogical results because of how 503(b)(9)
16 is drafted and interpreted by the 3rd Circuit. It's not the
17 first time Congress has done something like that, but they
18 certainly didn't rewrite 503(b)(9) notwithstanding that
19 there was extensive case law interpreting it just as I've
20 said, including against very sympathetic parties, including
21 pension beneficiaries and retirees, where notwithstanding
22 that the pension withdrawal claim occurs, arises post-
23 petition, their claims except for the work they did post-
24 petition are prepetition claims.

25 It would be totally illogical for me to assume

1 that Congress somehow rewrote out of the Code all of that
2 case law and intended that provision to somehow now be
3 interpreted to include the word "received" in it, as
4 interpreted by the 3rd Circuit. It just doesn't make any
5 sense.

6 MR. SCHWARTZ: May I respectfully submit to Your
7 Honor that when the goods are delivered postpetition that's
8 to a debtor in possession --

9 THE COURT: But the transaction is prepetition.
10 When a --

11 MR. SCHWARTZ: Performance is postpetition when
12 the goods are received by the debtor in possession.

13 THE COURT: No, the transaction is a prepetition
14 transaction. There are lots of times when things happen
15 postpetition. Frenville, for example, McFarlands, but the
16 consideration was prepetition, there was a contract
17 prepetition. There was a purchase order prepetition. It
18 couldn't be clearer under the case law.

19 MR. SCHWARTZ: I'm trying to put out the
20 consideration is provided postpetition to the debtors.

21 THE COURT: If the goods had not been delivered,
22 the debtors would have had a prepetition lawsuit against the
23 client -- your client.

24 MR. SCHWARTZ: Right.

25 THE COURT: That was the transaction, the

1 contract, the prepetition contract. It was performing --
2 your client and all the other parties who have made this
3 argument were performing a prepetition agreement. It wasn't
4 an agreement with the estate, it wasn't an agreement with
5 the debtor in possession.

6 MR. SCHWARTZ: May I respectfully submit the
7 estate accepted the goods.

8 THE COURT: But based on a prepetition contract.

9 MR. SCHWARTZ: But they got the goods, they have
10 to receive the consideration.

11 THE COURT: It doesn't matter. It doesn't --

12 MR. SCHWARTZ: So the estate said --

13 THE COURT: Do you have any case that supports
14 this? You don't, right, because you haven't cited any?

15 MR. SCHWARTZ: Well, the 3rd Circuit decision --

16 THE COURT: That's under 503(b) (9).

17 MR. SCHWARTZ: Correct.

18 THE COURT: Interpreting -- and it's crystal clear
19 that they're trying to deal with a specific word under
20 503(b) (9), not with policy, just with the matter of
21 statutory construction --

22 MR. SCHWARTZ: Well --

23 THE COURT: -- trying to figure out what the word
24 "received" means.

25 MR. SCHWARTZ: The 3rd Circuit did say it was

1 dealing with policy that 2-702 of the UCC was incorporated
2 in 546(c) and that in 2005 the Congress enacted an amendment
3 to 546(c) and also enacted 503(b)(9) which did establish a
4 policy as to vendors.

5 THE COURT: No, they don't say that. In fact,
6 they do not say that, sir. They say, in the context of
7 Section 503(b)(9) -- I'm sorry, the context of Section
8 503(b)(9) is clear, "It is an exception to the general
9 bankruptcy reclamation scheme established by Section 546(c).
10 Given the interrelationship between these two provisions and
11 our holding that Congress meant for terms used in Section
12 546(c) to bear the definition used in the Uniform Commercial
13 Code at the time of (indiscernible) enactment. It follows
14 that the UCC definitions also apply to the Section 503(b)(9)
15 exception."

16 And then they have a footnote that says, "We note
17 we did not in Mirren (ph) --" I'm sorry, "We note as we did
18 in Mirren that our reliance on the UCC in determining the
19 time of receipt does not mean that the definition of receipt
20 under the Bankruptcy Code is a matter of state law and might
21 change were an individual state to alter its laws; rather,
22 Congress intended to use the UCC definition at that time;
23 i.e., when it enacted the statute, physical possession, and
24 it is not subject to change absent an amendment to the
25 Bankruptcy Code."

1 It's all about 503(b)(9), it's just trying to
2 figure out what Congress meant by using that word. It
3 doesn't have anything to do with 503(b)(1). It's all in the
4 context of 503(b)(9). Nothing about vendors generally.

5 And again, I'll go back, I guess vendors are
6 important like every other creditor is important, but I
7 doubt Congress views anyone more important than pensioners
8 and retirees. It's enacted special statutes in certain
9 circumstances where they benefit, nevertheless, under the
10 case law even though the liability is crystallized when the
11 plan is terminated, the claim is postpetition only for their
12 postpetition work, that portion of it. The rest is
13 prepetition.

14 MR. SCHWARTZ: Right. Yes, Your Honor.

15 THE COURT: They didn't change the law, in other
16 words. They didn't create a special vendor category other
17 than 503(b)(9).

18 MR. SCHWARTZ: I don't mean to vex Your Honor --

19 THE COURT: I'm not vexed, I just don't -- it
20 doesn't -- I don't see anything to this. There's no special
21 vendor protection other than 503(b)(9) which is very
22 special, it created a whole new category of administrative
23 expenses, the only administrative expense that's
24 prepetition.

25 MR. SCHWARTZ: There's a general statutory

1 construction subsection should be harmonized, basically what
2 you're sanctioning here is that if Sears or KMart or any one
3 of the debtors had decided as New Co would, Transform,
4 whatever it's called now, they've sent out a letter to get
5 around 503(b)(9) for whatever Chapter 11 or whatever other
6 purpose they have, dealing with bills of lading so that they
7 establish an agent and so forth.

8 So the idea here is that if Sears had 19 days
9 before the petition date, said, okay, we're going to take
10 half of the common carrier's delivering goods, and we're
11 told, come back on October 16th that that would be then
12 those would just be general unsecured claims.

13 THE COURT: Yeah. I mean, that's -- Congress
14 drafted this exception, and it is an exception. And there
15 are ways around it. I doubt they really thought through all
16 the ways around it; in fact, I'm pretty sure they didn't.
17 And probably the people that were trying to get this in said
18 to themselves, we better get as good as we can get.

19 MR. SCHWARTZ: For the record, when there's a
20 position that it's an anomalous result I would assume
21 plausible result, it could never be imputed to Congress,
22 just stating it for the record.

23 THE COURT: Well, okay. But I will respond that
24 special purpose legislation often has this effect. It does
25 create anomalous results, but it's special purpose

1 legislation, it itself is anomalous, it doesn't mean that
2 the whole rest of the structure of the Bankruptcy Code has
3 to be turned on its axis to accommodate it. It's a special
4 purpose exception, it doesn't go beyond that.

5 MR. SCHWARTZ: Thank you, Your Honor.

6 THE COURT: Okay. Thank you.

7 MR. GALARDI: Your Honor, for the record, Greg
8 Galardi of Ropes and Gray on behalf of Apex.

9 I've heard Your Honor and I'm not going to try to
10 vex you. What I'm really going to do is -- and I understand
11 that when Congress does special legislation it has anomalous
12 results. We did argue and we believe there is a 503(b)(1)
13 basis based on 2nd Circuit law.

14 And I want to point to Your Honor cases we did
15 cite, and a case that actually does support the proposition
16 from the 9th Circuit with respect to 503(b)(1).

17 First, Your Honor, if you go to Chattooga 296
18 B.R. at 656, though the court didn't conclude that there was
19 a claim and instead had an evidentiary hearing, it
20 specifically took on Verizon and it says, "The Court can
21 nevertheless find that ACC used the service in question that
22 it wanted them and it needed them and it did so post-
23 petition knowingly and willingly.

24 You have Judge Bernstein's decision that's cited
25 in that case, Patient Education Media, that also looked to

1 whether the postpetition conduct induced the performance
2 postpetition.

3 THE COURT: But Patient Education Media was the
4 sound stage case, where they just left the sound stage there
5 and they used it.

6 MR. GALARDI: I understand, Your Honor. But here
7 we have the following difference. First, in the cases that
8 they were cited, Your Honor could look at the 9th Circuit
9 case, Coastal Trading case, 744 F.2d 686 where the 9th
10 Circuit actually said that UCC acceptance that occurred
11 after the petition date constituted an event and a
12 transaction that could give rise to the 503(b)(1) claim.

13 So that -- you may not agree with that case --

14 THE COURT: Well, the 2nd Circuit doesn't agree
15 with it, it's the --

16 MR. GALARDI: The 2nd Circuit hasn't ruled on
17 exactly that point, Your Honor.

18 THE COURT: But it's the -- if you have a
19 prepetition transaction it's not with the "estate."

20 MR. GALARDI: Your Honor, what you said is a
21 prepetition transaction and I hate to say this, but you put
22 the rabbit in the hat. Because what Chattooga says, which
23 is again, 296 B.R. 656, it's not whether you had a contract
24 or transaction, but it is to go beyond that and to say, what
25 would a postpetition event and could they constitute a

1 transaction not in the sense of the contract. That is
2 significant. The underlying theory is to encourage vendors
3 to deal with the postpetition estate, going on achieving
4 those goals requires satisfying the legitimate expectations
5 of those who supply postpetition goods and services. For
6 those reasons, it is circumstances surrounding the
7 postpetition delivery and receipt of goods, rather than
8 either the presence or absence of a contract for the
9 delivery of contractual privity that is determinative.
10 That's what we have argued.

11 THE COURT: How are they being induced?

12 MR. GALARDI: Your Honor, there's a first day
13 order that Your Honor I came before you and you said --

14 THE COURT: The first day order is a separate
15 issue.

16 MR. GALARDI: No.

17 THE COURT: But you argue the pre- and post point,
18 that's really -- they have to deliver.

19 MR. GALARDI: Actually you don't have to deliver,
20 Your Honor.

21 THE COURT: They have the -- and otherwise, they
22 have a reclamation order.

23 MR. GALARDI: No, they also have a right to stop
24 shipment when the goods haven't had the title passed. Those
25 are two valuable legal rights the vendors gave up.

1 The debtor instead says, we don't want to go
2 through that disruption, we don't want to go through that
3 litigation, we don't need thousands, and on the other side,
4 where you have the thousands of lift-stays, we want to
5 resolve this and we're going to say if you ship or deliver
6 postpetition you'll be paid in the ordinary course of
7 business.

8 THE COURT: Okay. That's the November 20th order.

9 MR. GALARDI: That's the November 20th order, it's
10 also when I came -- no, actually I think it's -- Your Honor,
11 I came back on the shipping, we qualified it, it was the
12 second day, yes, November 20th.

13 THE COURT: Right.

14 MR. GALARDI: We had this discussion in the
15 transcript --

16 THE COURT: That order I didn't think we were
17 going to be dealing with today. That needs to be dealt with
18 in a separate context.

19 MR. GALARDI: Well, but, Your Honor, that exactly
20 is the context because our position is, with that order,
21 with us coming in and saying exactly what we said, Your
22 Honor said --

23 THE COURT: Well, I'm sorry, Mr. Galardi, the main
24 thrust of -- maybe everyone else's of your colleagues, on
25 your side of the table this time was not really based on

1 that. It's based on this theory that receipt has somehow
2 been elevated now into delivery.

3 I appreciate the issues raised by the November
4 20th order. There are two conflicting paragraphs in that
5 order, for example. The debtors assert that there were
6 discussions back and forth on the record; that's really not
7 in front of me today. I'm going to deal with that another
8 day.

9 MR. GALARDI: But, Your Honor, here's the issue.
10 You're being asked to rule today. And maybe I am excluded
11 from this, but you're being asked to rule today that there
12 was no, and I want to understand a final order, there is no
13 503(b)(1) for any vendor who delivered. What I am
14 suggesting --

15 THE COURT: I'm not saying that.

16 MR. GALARDI: Okay.

17 THE COURT: What I'm saying is, there is no
18 503(b)(1) based on a theory that if you -- separate and
19 apart from this order, separate and apart from the November
20 20th order -- on the theory that you are entitled to an
21 administrative claim because you delivered postpetition as a
22 matter of law.

23 MR. GALARDI: That somehow receipt, so somehow
24 there has to be consistency, I understanding that, and
25 that's why we said we're not going to fight it, and it's 3rd

1 Circuit and everything else.

2 THE COURT: But the separate issue, the effect of
3 the order, that's for another day. To me, that's a more
4 complicated issue and, you know, I had like seven of these,
5 I think you might have been the only one that raised that
6 point, and I'd rather deal with that separately.

7 MR. GALARDI: And I think -- so then we would ask
8 if Your Honor just to move forward with that at some point
9 in the not too distant future because I did --

10 THE COURT: That's fine.

11 MR. GALARDI: -- raise it back in November ---

12 THE COURT: That's fine.

13 MR. GALARDI: -- and our motion has been pending.

14 THE COURT: But there are a lot of other issues
15 related to that, like --

16 MR. GALARDI: Understood.

17 THE COURT: -- what were the discussions, who did
18 what, that's the type of thing that I think people should be
19 talking about.

20 MR. GALARDI: Your Honor --

21 THE COURT: You know, the Indian company, Pearl,
22 says we were told X, Y and Z. I don't know if that's true or
23 not; I think it depends, because the order itself is just a
24 starting point. The order has two conflicting provisions.
25 So it may be a case-by-case determination.

1 MR. GALARDI: Your Honor, again as we've said in
2 our papers and I'll leave it for another day, we actually
3 don't think when you make a public statement of the sort,
4 and I'm not sure what two inconsistent remarks you're saying
5 --

6 THE COURT: Well, I'll read them. Paragraph 8
7 says, "All undisputed obligations of the debtors arising
8 from the postpetition delivery or shipment," so it has the
9 word "delivery," there's a typo, "by, of goods under the
10 Prepetition Orders, are granted administrative expense
11 priority status pursuant to Section 503(b)(1)(A) of the
12 Bankruptcy Code."

13 And then it goes on to say, "and the Debtors are
14 authorized, but not directed to pay such obligations in the
15 ordinary course of business, consistent with the parties'
16 customary practices in effect prior to the commencement
17 date."

18 Now, "Prepetition Orders" itself, that term isn't
19 defined in this order.

20 MR. GALARDI: Correct.

21 THE COURT: Second, though, paragraph 12 says,
22 "Notwithstanding entry of this order, nothing herein shall
23 create, nor is intended to create any rights in favor of or
24 enhance the status of any claim held by any party."

25 MR. GALARDI: Your Honor, I guess we'll have the

1 dispute later, but if the debtor is going to take the
2 position a reservation of rights, when you have that
3 specific undefined.

4 THE COURT: They have taken the position.

5 MR. GALARDI: I understand, but it's your order,
6 Your Honor, that's why I was here in November to ask for
7 exactly that clarification, knowing exactly that this would
8 be the debtors' change of position, and that's why we think
9 judicial estoppel applies --

10 THE COURT: Well --

11 MR. GALARDI: -- and we don't need an evidentiary
12 hearing on this.

13 THE COURT: Well, I would need to go through the
14 transcript of that hearing. But in addition to that, I
15 think that there may be issues with individual creditors. I
16 don't know what they were actually told. I don't know if
17 they were told, oh, forget about that order, for example, or
18 forget about paragraph 12, so.

19 MR. GALARDI: Yes, Your Honor, I mean, I guess
20 we'll do that but then we're going to be having, for
21 example, my client probably has \$7 million in administrative
22 claims, whether they're 503(b)(1) or (9) this will come up
23 again in the not too distant future --

24 THE COURT: Well, perhaps but they'll -- it's not
25 a blanket ruling in other words.

1 MR. GALARDI: It should be a blanket rule, Your
2 Honor, with all due respect when a debtor publishes an order
3 to all of the vendors an intention to give them, and Your
4 Honor and I have practiced where it's out of an abundance of
5 caution, to give them an order so we can shove it -- give it
6 to the vendors and let it --

7 THE COURT: It's a five page order, it's not that
8 hard to read.

9 MR. GALARDI: Exactly and it's not that hard to
10 convince shippers and vendors to ship based on that order,
11 which is exactly what the practice the debtors do.

12 THE COURT: Well, I don't know.

13 MR. GALARDI: Okay.

14 THE COURT: I mean, it depends, I think. Some
15 vendors might be delighted to ship because they're going to
16 get paid at least for what they have in their inventory.

17 MR. GALARDI: That's fine, Your Honor, we'll --

18 THE COURT: And then they keep doing it, and they
19 get a new order, the Indian company for example, got an
20 order that three times as large as what they shipped.

21 MR. GALARDI: Yes, Your Honor.

22 THE COURT: Really, I mean, I think at that point
23 people should be going through the claims resolution process
24 --

25 MR. GALARDI: But this is --

1 THE COURT: -- and this is a point to raise as
2 part of that process.

3 MR. GALARDI: Well, but the claims resolution
4 process is addressed to prepetition claims.

5 THE COURT: Well --

6 MR. GALARDI: This goes to administrative claims.
7 It's not a 503(b)(1), this goes directly to what should have
8 been paid in the ordinary course.

9 THE COURT: But I don't think it's a case where
10 you can do it as it's teed up before me today. I don't have
11 any witnesses. I think you would want to talk to the debtors
12 first about it -- you say you have either 503(b)(9) or
13 503(b)(1) you want to liquidate -- and decide which is which
14 and see what your area is. I mean it's --

15 MR. GALARDI: Well, Your Honor, I think we'd be
16 prepared to put up witnesses at the next hearing very
17 rapidly on the (b)(1). It's not a simple overlap issue.
18 There is no dispute over the --

19 THE COURT: Well, there may not be, there may not
20 be, but at least normally people try to quantify what
21 they're fighting over in bankruptcy and --

22 MR. GALARDI: Our first motion did, it said \$5.4
23 million in 503(b)(1) and \$1.7 million; this issue has been
24 out there. We were prepared again, Your Honor had the sale
25 hearing, you had all these hearings --

1 THE COURT: Right.

2 MR. GALARDI: -- we're prepared to come back in
3 very short order and put on evidence with respect to the
4 claims.

5 THE COURT: Okay. That's fine.

6 MR. FAIL: Your Honor --

7 THE COURT: I just suggest that maybe you go
8 through it with the debtors first.

9 MR. GALARDI: We have tried.

10 THE COURT: Okay. All right. And are these
11 potential claims that Transform's picking up?

12 MR. GALARDI: No.

13 THE COURT: No, they're not, okay.

14 MR. FAIL: Your Honor, just so they don't pile up,
15 I'll just add a couple of rebuttal points.

16 First in terms of the process, the debtors don't
17 believe that admin claimants can properly file motions and
18 appear at their discretion on 14 days' notice. If people
19 aren't paid there's contested matters that need to be
20 commenced, but the debtors aren't inviting that, the debtors
21 will work and review issues.

22 Mr. Galardi and his clients, all of these parties
23 and movants, and understand the complexity of the issue, and
24 the way that they've interrelated 503(b)(1) to 503(b)(9) we
25 sought to provide them the clarity for 503(b)(1), and I

1 think Your Honor's ruling today has gone very far to that
2 end.

3 With respect to the allegation that the final
4 order could have influenced any party, but that point in
5 time I believe the allegations in the -- in Apex's motion
6 were that the goods were delivered, so I mean the parties --

7 THE COURT: But those were the factual issues that
8 --

9 MR. FAIL: -- before they move going -- I agree --

10 THE COURT: -- depend on each vendor.

11 MR. FAIL: -- factual issues, I'm just saying the
12 parties should be cautioned about making statements about
13 reliance that occurred after the fact. Our position on that
14 has been very clear from the very first minute it was
15 raised. Any party that would have asked us would have been
16 directed to the paragraph that said you're not going to get
17 an increased priority.

18 There was reference to the Chattooga case, but the
19 citation that was given referred -- it was familiar, because
20 I read all the 50 cases that were cited last night; again,
21 it was the Adelpia Business Solutions case. And the issue
22 in that case that was being determined had nothing to do
23 with delivery or shipment. It had to do with two different
24 debtors and Verizon saying one of them owed me money, and
25 there were defenses, one saying was the other, it was a

1 contract with the other, has nothing to do with this
2 whatsoever. Whatsoever.

3 And then there was also reference to the Coastal
4 Trading case, which other courts have distinguished and said
5 isn't binding and isn't definitive.

6 So for another day, for another time for
7 503(b)(9), but I don't want to leave the record mistaken
8 that the debtors accept any of the statements that were
9 made.

10 THE COURT: Okay.

11 MS. BENCZE: I've sort of been going out of turn,
12 Your Honor. Nola Bencze with Clark Hill, and I represent
13 Milton Manufacturing.

14 I heard you loud and clear, Your Honor. We
15 reserve any rights as to our 503(b)(9), and that obviously
16 will be decided in accordance with your Judge's order.

17 I've heard the arguments. In our papers we did
18 point to that order, the November 20th order as part of the
19 inducement. The use of the term of "inducement," actually,
20 Your Honor, is coming from the Adelphia Business Solutions
21 case which debtors' counsel just mentioned, as well as
22 Jartran, and perhaps Jartran is a case you may recall
23 because it dealt with the Yellow Pages, a prepetition
24 contract.

25 And the Yellow Page vendor, you know, ran the ads

1 postpetition and it turned out the debtors didn't want them,
2 and said we never wanted them. And the significance about
3 that, Your Honor, is that the transaction with the debtor in
4 possession is satisfied by either inducement to do the
5 postpetition transaction, or where the benefit is knowingly
6 accepted, and I'm quoting Adelphia Business Solutions, as
7 well as Jartran.

8 I think that's significant here because the debtor
9 surely accepted the goods when it arrived at its facilities,
10 sold them, and used them to carry on whatever was necessary
11 to operate the Chapter 11.

12 THE COURT: The debtor borrowed money that it had
13 in its bank account prepetition that it used postpetition.
14 Your logic would suggest that is also an administrative
15 expense.

16 MS. BENCZE: Well, I don't know that I would agree
17 with you on that, because the borrowed money is in their
18 bank account based on a whole set of different
19 relationships.

20 THE COURT: But it used it postpetition, so it
21 can't be the post-petition use.

22 MS. BENCZE: No, it's not the postpetition use,
23 Your Honor, perhaps I misexplained that. It's the fact that
24 it was welcomed and wanted.

25 THE COURT: I'm sure they wanted the money too.

1 MS. BENCZE: I do, Your Honor, I see what you're
2 asking me, I really don't agree with the analogy.

3 THE COURT: Okay.

4 MS. BENCZE: Because to me the money in the bank
5 account, maybe at this point, my life (indiscernible) so,
6 you know, how that money got there and so on and so forth,
7 but I don't see it, so I apologize.

8 But that's the cases we were relying on, they were
9 not -- I mean, I definitely see the end world in Ports (ph)
10 case, but that was not what we relied upon. We were relying
11 upon what had been previously held in the 2nd Circuit.

12 So I wanted to bring that to your attention.

13 THE COURT: Okay.

14 MS. BENCZE: And I guess ask a question, Your
15 Honor. What -- I hear our discussion here, I hear you feel
16 there needs to be another day in regard to determination as
17 to the November 20th motion.

18 THE COURT: Order.

19 MS. BENCZE: I'm sorry, order.

20 THE COURT: Right.

21 MS. BENCZE: What is happening today with the
22 503(b)(1)? I mean, what are -- is this being put off for
23 another day?

24 THE COURT: Well, I mean, no one -- I don't know
25 what you're expecting. Every vendor as far as its reliance

1 on this order is different. So clearly I wasn't going to
2 decide that today. I did have this one legal issue which
3 was posited to me, which is simply based upon when a debtor
4 actually gets physical possession of goods decides whether
5 it's a pre- or postpetition claim and I'm happy to have
6 ruled on that, because I think that's just not correct as a
7 matter of law.

8 Other than that, I don't know what -- you know,
9 it's just not -- it's not teed up properly before me at this
10 point.

11 MS. BENCZE: Well, we have other counsel, Your
12 Honor, thank you, Your Honor.

13 MR. FAIL: Your Honor, just on the process point,
14 the debtors haven't objected to the claim so if the debtors
15 will review the claim --

16 THE COURT: I mean they're filed administrative
17 claims.

18 MR. FAIL: If they were, they were; if they
19 weren't, a motion doesn't give it an ability to file or an
20 amendment to a claim, but we'll review them. Although
21 Milton did not make the argument for Alliance, I'm not sure
22 why it's being brought up if it was supposed to be today.

23 THE COURT: Okay.

24 MR. FAIL: Milton raised that point; there are
25 2,000 claims asserting 503(b) (9) that we're processing.

1 We'll evaluate and we'll object or we'll allow or we'll
2 negotiate in due course.

3 THE COURT: Well, these are not -- I mean, the
4 503(b)(9)'s will be dealt with separately. There's, no
5 one's here pushing the 503(b)(9) claim today. It's the
6 503(b)(1) claims. They do -- I mean, there's no
7 administrative expense bar date.

8 MR. FAIL: Right, so there were two -- there were
9 only two parties, Pearl and Apex that were asserting it, and
10 we could figure out if we need to schedule a hearing --

11 THE COURT: Right.

12 MR. FAIL: -- or agree to wait and see.

13 THE COURT: And you're --

14 MR. FAIL: It may be moot if we agree that they
15 have a 503(b)(9) in certain circumstances.

16 THE COURT: Well, I think Apex says it's not moot
17 because there's a difference, like one's 5 and one's 2
18 million.

19 You're Pearl, right?

20 MR. WANDER: Well, I'm David Wander.

21 THE COURT: Well, I know, but you're representing
22 Pearl, I'm sorry.

23 MR. WANDER: Yes, Your Honor, David Wander of
24 Davidoff Hutcher & Citron, counsel for Pearl Global
25 Industries. I will be very brief, Your Honor.

1 THE COURT: Okay.

2 MR. WANDER: First, I want the record to be clear,
3 whatever we put in our motion, the relief we were seeking,
4 we're not -- we did not come to court today to ask Your
5 Honor for a ruling to pay our client, even if you ruled in
6 our favor on the legal issue.

7 THE COURT: Right.

8 MR. WANDER: The time to go over the invoices is
9 for another day.

10 THE COURT: Okay.

11 MR. WANDER: I put in my reply, I only disagree
12 with Your Honor on one item so to speak, which is I do
13 believe that in order for the case to move forward and
14 confirmation of the plan that has been filed and amended
15 that there needs to be a ruling on both the 503(b)(9) issue
16 and World Imports and "receive," that issue, as well as the
17 503(b)(1). I recognize that that's not going to happen
18 today, but that's what we had said we needed today.

19 THE COURT: Well, clearly I will at a minimum have
20 to estimate the allowed administrative expenses for
21 confirmation purposes.

22 MR. WANDER: Correct, correct. So we did make the
23 inducement claim; we're the Indian company that Your Honor
24 referred to.

25 THE COURT: Right.

1 MR. WANDER: And I'm going to be very brief
2 because I do agree that this is not for today. I just want
3 to be clear that my client's inducement claim is not based
4 on the order of the Court. Okay. And I wasn't representing
5 my client at that time, I don't believe they had counsel.

6 My client's inducement claim is based on the e-
7 mail that was sent to my client and all the foreign buyers
8 and I just want that to be understood, and I believe that
9 may be a difference in our papers, but not necessarily a
10 difference in the positions of the claimants because that e-
11 mail was addressed to I believe all foreign vendors.

12 So I just want that to be -- the record to be
13 clear as we go forward with the discovery, in discovery or
14 whatever procedure they propose, that our reliance was based
15 on the e-mail that was sent to our client, and we believe
16 the other foreign vendors.

17 I do believe we should have some order on the
18 503(b)(1) issue, just as a matter of the record, but as far
19 as our motion I'll continue with the debtors' counsel with
20 regard to the inducement claim and wait for the 503(b)(9) to
21 be teed up whenever Your Honor does it.

22 THE COURT: Okay. I mean, I think -- I mean,
23 obviously the debtors have filed a plan, you're in plan
24 discussions, contemplating a confirmation hearing. You
25 should give some thought with the Committee on how to deal

1 with these issues in sort of a global context as part of
2 confirmation.

3 MR. FAIL: Thank you, Your Honor, we will and
4 we're looking at the claims as they were asserted, parties
5 asserted claims in ways that are favorable and we're going
6 to address those that were asserted, not hypotheticals.
7 Obviously Mr. Wander referred to a record, I assume, and the
8 Court should only take that to mean his statement. There
9 are no facts in evidence with respect to any correspondence.

10 THE COURT: Absolutely. But people should be
11 turning to facts, I mean, it takes two for example, not just
12 one party.

13 MR. SARACHEK: Your Honor, Joe Sarachek on behalf
14 of Mien. Really two points and I won't repeat, and we are
15 all talking the 503(b)(9) creditors and, you know, with
16 respect to Mien in particular, just so it's clear, the order
17 of Mien and it's a small order, but it had -- it
18 reverberates throughout like China I'd say, and I have a
19 bunch of Chinese clients, their order was prepetition. The
20 goods were delivered postpetition, they were at the freight
21 forwarder. The freight forwarder was not going to release
22 those goods to Sears absent, my understanding is, receiving
23 your November 20th order.

24 Sears subsequently recognized that the goods came
25 postpetition, and they, Sears, believed that they were only

1 obligated to pay Mien postpetition some time in February.
2 They at one point said, we're going to pay you and then they
3 got into this whole --

4 MR. FAIL: Your Honor, I'm going to --

5 MR. SARACHEK: Wait, wait one second. Well, the
6 point is, Sears acknowledged that they did not have receipt
7 of the goods. And Sears, in fact, said, oh, no, this is
8 ESL's obligation, Your Honor.

9 THE COURT: Look, it's -- I know you're an officer
10 of the court but this isn't evidence.

11 MR. SARACHEK: Well, it's in an affidavit, Your
12 Honor.

13 THE COURT: Well, but it's still not evidence. I
14 don't have that person here.

15 MR. SARACHEK: I understand. I want -- I need to
16 emphasize to the Court that --

17 THE COURT: And they'd be happy to have ESL pay
18 for it, that doesn't mean that they accept that it's a post-
19 petition claim, they're happy to have ESL pay for it. I
20 don't think that matters.

21 MR. SARACHEK: Your Honor, I need to emphasize to
22 the Court --

23 THE COURT: I'm happy to have ESL pay for it, too,
24 I mean, you know.

25 MR. SARACHEK: Well, so would we and June 1st

1 according to the Court's previous order they're obligated to
2 pay \$139 million --

3 THE COURT: Right.

4 MR. SARACHEK: -- and candidly we have been
5 reaching out to Weil throughout this process. We have not
6 gotten any satisfaction of assurance of payment, and quite
7 frankly we're really quite all of us uncertain where the
8 claims resolution process is. And the reverberations are
9 that many of our clients are facing insolvency themselves.
10 And that's a real fact.

11 So if they're not paid, whether it's on the small
12 amount or on the larger amount, there are consequences, Your
13 Honor.

14 THE COURT: Okay.

15 MR. SARACHEK: And we're not getting any
16 satisfaction from dealing with debtors' counsel because
17 we're not getting any clarity, notwithstanding and you've
18 referred to that you have these two orders on 503(b)(9);
19 well, we've called them umpteen times to discuss resolution
20 and some certainty, and we have no certainty.

21 And so, you know, cutting through all the red
22 tape, we're all here because we do need certainty on behalf
23 of our clients. We weren't expecting you to order that they
24 pay us today, but we do need some certainty.

25 THE COURT: Okay.

1 MR. SARACHEK: Thank you.

2 THE COURT: Okay.

3 MS. WEYAND: Thank you, Your Honor, Jacqueline
4 Weyand from Buchanan Ingersoll and Rooney, on behalf of
5 Gokoldas.

6 I think the arguments have been set forth by my
7 colleagues here today. The one distinct fact to that is
8 different from us is that we do have a postpetition claim.
9 In December of 2018 we were called to ship approximately
10 \$850,000 worth of goods to the debtor, and it's very clear
11 that's after the petition date, so these amounts are
12 entitled to administrative expense priority, because they
13 constitute postpetition transactions.

14 THE COURT: Has the debtor objected to that?

15 MS. WEYAND: At this time, we have not been paid
16 and --

17 THE COURT: No, payment is another story.

18 MS. WEYAND: I don't have an objection in writing,
19 no.

20 THE COURT: Okay.

21 MR. FAIL: Your Honor, Garrett Fail for the
22 record. I think we said in our pleadings to the extent that
23 the invoices match books and records we believe it would be
24 entitled to administrative expense priority. We haven't
25 done the reconciliation, there were thousands of vendors,

1 and as Your Honor knows, the debtors have transferred their
2 employees to the buyer who have other responsibilities, and
3 we're working the best we can to do reconciliation. But the
4 best use of -- and the best efficiency is not going to be
5 obtained by responding to one-off inquiries.

6 So we don't dispute that this is a postpetition
7 payment, and we said in our reply that this is tied up with
8 our dispute with the buyer in terms of the postpetition
9 liabilities that we believe the buyer has assumed.

10 MS. WEYAND: And, Your Honor, may we just ask for
11 some clarity on this issue as soon as possible.

12 THE COURT: Okay.

13 MS. WEYAND: Thank you.

14 THE COURT: So is anyone looking for payment,
15 immediate payment? Are you looking for immediate payment?
16 I'm trying to figure --

17 MS. WEYAND: If Your Honor is inclined to grant
18 it, then yes.

19 THE COURT: Okay. All right.

20 MR. FAIL: Your Honor, and so then we would oppose
21 that request --

22 THE COURT: Right.

23 MR. FAIL: -- for the reasons set forth in our
24 pleading --

25 THE COURT: Any objection.

1 MR. FAIL: -- and the obvious facts.

2 THE COURT: Okay.

3 MR. SARACHEK: We were, Your Honor.

4 THE COURT: Okay.

5 MR. SARACHEK: Mien was.

6 THE COURT: Okay.

7 MR. SARACHEK: Of \$14,000.

8 THE COURT: Okay. Well, all right, anyone else?

9 (No response)

10 THE COURT: Okay. I have before me a number of
11 motions by trade creditors, vendors of the debtors, for the
12 allowance and payment of an administrative expense under
13 Section 503(b)(1) of the Bankruptcy Code.

14 As I noted during oral argument, a couple of those
15 motions seek also immediate payment of the administrative
16 expense, to the extent that it is allowed.

17 There are three orders in place in this case that are
18 relevant to these motions. There's a final order
19 authorizing the debtors to pay prepetition claims and
20 confirm administrative expense priority for prepetition
21 orders, to move into the debtors' postpetition and satisfy
22 such obligations in the ordinary course of business, that's
23 dated November 20th, 2018.

24 There is an order dated February 22nd, 2019 that
25 in part has procedures for resolving claims under Section

1 503(b)(9) of the Bankruptcy Code as well as asserting --
2 requiring that those claims be asserted by the bar date.

3 And then finally there's an order dated March
4 28th, 2019 dealing with claim objection procedures
5 generally.

6 One common issue has been raised in the motions
7 that I read as an attempt to move certain claims that may or
8 may not be 503(b)(9) claims (which if allowed are, in fact,
9 accorded an administrative expense priority on the same
10 level as 503(b)(1) claims, but under my February order, need
11 to be resolved pursuant to the procedures in that order).

12 One aspect again of the motions before me seeks to
13 take claims that might fall under 503(b)(9), because the
14 agreement under which the claim, the goods were provided was
15 a prepetition agreement, into the 503(b)(1) category.

16 In addition to that, and in addition to the couple
17 of motions that seek immediate payment of any allowed
18 administrative expense claim, certain of the motions state
19 that notwithstanding the prepetition nature of the
20 transaction between the vendor and the debtor, the debtor
21 engaged in certain conduct that turned that prepetition
22 transaction into a postpetition administrative expense
23 transaction under 503(b)(1), either based on the November
24 20th, 2018 order or other postpetition representations that
25 were made to the particular vendor.

1 I have determined that that latter category of
2 administrative expense claim cannot be decided today, but
3 requires case-by-case determination based on the evidence
4 applicable to the particular transaction or the particular
5 vendor.

6 No claimant has the ability today to get that
7 evidence before me, and I should therefore not consider that
8 aspect of its argument today.

9 I can decide today the issue of whether any
10 allowed administrative expense should be paid now and I will
11 lay that out on the record, since there are a couple of
12 requests for that. And the debtors have acknowledged that
13 they will pay undisputed administrative expenses at some
14 point, they just object to them being paid now.

15 It's well established that the timing of
16 distributions for administrative expense payments other than
17 at the close of the case under Section 1129(a) (9) of the
18 Bankruptcy Code which requires unless agreed to a different
19 treatment by the administrative expense creditor to be paid
20 at the earlier -- I'm sorry, at the later of the effective
21 date of the plan or the allowance of the claim, is within
22 the discretion of the Court.

23 As the leading treatise on bankruptcy states,
24 generally courts have held that the timing for payment of
25 administrative claims is a matter to be determined within

1 the discretion of the bankruptcy court. Factors influencing
2 the exercise of this discretion may include the status of
3 the case, the ability of the debtor to pay such claims, and
4 the particular needs of the administrative claimants, and
5 the probability that future administrative claims may not be
6 paid in full. The latter point is especially important.
7 Courts generally recognize that the timing of an
8 administrative expense payment should be used to ensure the
9 orderly and equal distribution among creditors similarly
10 situated, and the need to prevent a race to a debtor's
11 assets, if there is a doubt as to the administrative
12 solvency of the debtor overall. See generally *In re Korea*
13 *Cho Sun Daily Times*, 337 B.R. 773, 784 (Bankr. E.D.N.Y.
14 2005), and *In re Shihai*, 392 B.R. 62, 67 through 68 (Bankr.
15 S.D.N.Y. 2008). See also *In re Baptist Medical Center of*
16 *New York, Inc.*, 52 B.R. 417, 421 (E.D.N.Y. 1985), *aff'd*, 781
17 F2d 973 (2d Cir. 1986).

18 In this case there is a serious question on a
19 debtor-by-debtor level as to the debtors' administrative
20 solvency, was readily -- particularly at this time where the
21 purchaser of substantially all of the debtor's assets,
22 Transform, has not made the payments under the asset
23 purchase agreement. And, in addition, certain creditors have
24 asserted very large administrative expenses under 507(b) of
25 the Bankruptcy Code, which under the plain terms of that

1 section take priority over other administrative expenses
2 under Section 507.

3 So in the exercise of my discretion I believe that
4 it would be improper to direct the payment of any particular
5 administrative expense at this point, even where, as is
6 asserted, by Mien, M-I-E-N, one of the movants, that non-
7 payment will have a material adverse effect on it. That is
8 one of the factors a court should consider, but given the
9 number of administrative expense creditors and the fact that
10 non-payment will adversely affect any administrative expense
11 creditor, I don't believe it is dispositive here.

12 I will also rule on the one remaining issue that
13 was raised I believe in all of the pending motions, which is
14 whether under the Bankruptcy Code a vendor who enters into a
15 prepetition agreement with a debtor but delivers the goods
16 so that they are actually received in the possession or
17 constructive possession of the debtor postpetition, as a
18 matter of law has a postpetition administrative expense
19 claim under Section 503(b) (1) of the Bankruptcy Code.

20 The burden of proving entitlement to a priority
21 payment as an administrative expense rests with the party
22 requesting it. In re Bethlehem Steel Corp., 479 F3d 161, 172
23 (2d Cir. 2007). And unless there is a contrary policy under
24 the Bankruptcy Code, a specific policy that is, specifically
25 enunciated, the application of Section 503(b) (1) to a

1 particular set of facts should be narrowly construed because
2 of the overriding policy that the debtors' limited resources
3 will be equally distributed among the creditors and a
4 hundred percent statutory priority violates that policy and
5 takes money out of the general creditor body's pocket. See
6 Trustees of Amalgamated Insurance Fund v McFarlin's, Inc.,
7 789 F.2d 98, 101 (2d Cir. 1986) -- I'm sorry at 100, (2d Cir.
8 1986) and In re Ace Elevator Company, Inc., 347 B.R. 473
9 (Bankr. S.D.N.Y. 2006).

10 As stated by the district court in In Re Hostess
11 Brands, Inc., 498 B.R. 406 (S.D.N.Y. 2013), "The case law
12 governing the grant of administrative expenses is well
13 established in the Second Circuit. Section 507 of the
14 Bankruptcy Code gives first priority to administrative
15 expenses allowed under 11 U.S.C. Section 503(b) defined as
16 including 'the actual necessary costs and expenses of
17 preserving the estate including wages, salaries or
18 commissions for services rendered after commencement of the
19 case.' "An expense is administrative only if it arises out
20 of a transaction between the creditor and the bankrupt's
21 trustee or debtor in possession, and only to the extent that
22 the consideration supporting the claimant's right to payment
23 was both supplied to and beneficial to the debtor in
24 possession in the operation of the business." Hostess, 499
25 B.R. at 411, quoting from McFarlin's, 789 F.2d at 101.

1 McFarlin's and Judge Ramos go on to say at the
2 same page of Hostess, "A debt is not entitled to priority
3 simply because the right to payment arises after the debtor
4 in possession has begun managing the estate. Rather it must
5 be a postpetition transaction between the claimant and the
6 debtor in possession, and the considerations supporting the
7 right to payment must have been both supplied to and
8 beneficial to the debtor in possession in the operation of
9 the business postpetition."

10 Here it was argued that Congress somehow changed
11 that general rule supported by the plain language of Section
12 503(b), or derived from the plain language of Section
13 503(b)(1), when in 2005 it enacted Sections -- revised
14 Sections 546 and 503(b)(9) of the Bankruptcy Code.

15 The movants contend that because it has been
16 interpreted that a claim entitled to administrative expense
17 under Section 503(b)(9) arises when the debtor or its agent
18 takes physical possession of the goods, that physical
19 possession of the goods being obtained postpetition also
20 gives rise to an administrative expense under Section
21 503(b)(1) of the Code.

22 This argument is misguided. Section 503(b)(9) was
23 special purpose, special interest legislation adopted
24 specifically to favor dealers of goods as an exception to
25 the general requirement under Section 503(b)(1), as

1 previously articulated by the McFarlin's and Hostess courts,
2 that the transaction and the consideration both be with the
3 debtor or debtor in possession postpetition.

4 503(b) (9) gives a priority based on prepetition
5 conduct. And it is narrowly drafted and differently drafted
6 than Section 503(b) (1). It uses a term which was the term
7 construed by the 3rd Circuit upon which the movants rely on.
8 In re World Imports Limited, 862 F3d 338 (3d Cir. 2017), to
9 be focused on a specific word in that section, which does
10 not appear in Section 503(b) (1). Section 503(b) (9) gives an
11 administrative expense priority to the value -- "the value
12 of any goods RECEIVED by the debtor within 20 days before
13 the date of the commencement of the case under this title,
14 in which goods have been sold to the debtor in the ordinary
15 course of such debtor's business."

16 As was entirely appropriate, the Court in World
17 Imports Limited interpreted the meaning of the word
18 "received" in Section 503(b) (9), which was open to different
19 interpretations because it's not defined in the Bankruptcy
20 Code.

21 It determined, overruling the bankruptcy court and
22 the district court, that "received" in Congress' mind must
23 have meant the general use of that term in the then existing
24 form of the Uniform Commercial Code. Therefore, it means
25 taking physical possession of the goods either by the debtor

1 or its agent. Id. at Section -- at pages 343 through 344.

2 That section of the Code and that interpretation
3 are entirely separate from what is the issue here, which is
4 whether a claim arises under Section 503(b)(1) of the Code,
5 and, therefore, it would not apply here under these facts.

6 (It's not clear to me whether the 2nd Circuit
7 would adopt that interpretation, either, but that's in fact
8 irrelevant for purposes of the matter before me today since
9 no 503(b)(9) issues are before me.)

10 It's argued by the movants that interpreting
11 Section 503(b)(9) according to its plain terms as would be
12 based on the 3rd Circuit's interpretation of Section
13 503(b)(9) would lead to anomalous results where certain
14 assets, certain goods, excuse me, delivered outside of
15 either the applicable petition date or the 20-day window
16 would not be entitled to a priority, or would be entitled to
17 a priority.

18 Whether there was an anomalous result is
19 insufficient, however, for me to conclude that Congress
20 decided to change a long established interpretation of
21 Section 503(b)(1), which it was obviously fully aware of
22 when it enacted BAPCPA in 2005, to develop a special general
23 rule under (b)(1) as opposed to (b)(9) for vendor claims.
24 And, indeed, the courts have continued to apply the
25 McFarlands' definition after 2005 including District Judge

1 Ramos in the Hostess case I quoted from, from 2013. It
2 continues to be the case that a debtor in possession or
3 trustee needs to engage in a postpetition transaction or
4 postpetition conduct that then is, in addition, beneficial
5 to the estate, to give rise to an administrative expense
6 under Section 503(b) (1) .

7 The mere fact of delivery postpetition where the
8 transaction was entered into prepetition is insufficient to
9 give rise to such a claim.

10 So I will deny that aspect of the motions without
11 ruling on the others that I've reserved decision on. And
12 the debtors can submit an order consistent with that. You
13 don't need to formally settle an order, but you should
14 circulate it to the movants.

15 MR. FAIL: Thank you very much, Your Honor.

16 THE COURT: Okay. That's the end of the agenda,
17 correct?

18 MR. FAIL: That is the end of today's agenda.

19 THE COURT: Okay. Very well, thank you.

20 (Proceedings concluded at 1:27 p.m.)

21 * * * * *

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327(a) of the Bankruptcy Code, Bankruptcy Rule 2014,

and Local Bankruptcy Rules 2014-1 and 2016-1, for

the Entry of an Order Authorizing the Retention and

Employment of Ballard Spahr LLP as Counsel to the

Fee Examiner, Nunc Pro Tunc to the Appointment Date

filed by Paul E. Hamer on behalf of Fee Examiner

(document #3682)

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3097, 2753, 2314, 2995, 3152, 1774) filed by Luke A

Barefoot on behalf of Transform Holdco LLC. (document

#3298)

C E R T I F I C A T I O N

We, Sherri Lynn Breach and Sheila Orms, certify that
the foregoing transcript is a true and accurate record of
the proceedings.

Sherri L.
Breach

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